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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1945

LLOYD C. DUNCAN, PETITIONER

v.

DUKE PAOA KAHANAMOKU, SHERIFF, CITY AND COUNTY OF HONOLULU

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	2
1. Martial law in Hawaii	3
2. Petitioner's provost court trial	8
3. The habeas corpus proceeding	9
Summary of Argument	19
Argument	20
I. The Hawaiian Organic Act authorized petitioner's trial in a provost court	22
A. The statutory power to declare martial law embraced authority for the military trial of petitioner's offense	24
1. Plenary power to establish and exercise martial law, as previously authorized by the Hawaiian Constitution, was conferred by Congress	24
2. The petitioner's provost court trial did not involve an abuse of discretion	36
B. The Constitution, as applicable to Hawaii, did not prohibit the exercise of martial law here involved	38
1. Sections 5 and 67 of the Organic Act, read together, are not intended to extend to the Territory any constitutional prohibition against petitioner's provost court trial	39
2. Congress had authority to limit the extension of the Constitution to Hawaii so as to preserve the exercise of the federal powers here in question	42
II. The Constitution, even if fully applicable to Hawaii, did not prohibit the petitioner's provost court trial	57
A. Under martial law declared pursuant to statute the trial of offenses in military tribunals is constitutional if that course is reasonably deemed to be necessary by the military authorities	57

675125—45——1

Argument—Continued.
II. The Constitution—Continued. Page
B. The military commander's judgment that military necessity required a military trial of the offense here involved was not unreasonable... 68
Conclusion... 79
Appendix... 80

CITATIONS

Cases:

American Publishing Co. v. *Fisher*, 166 U. S. 464... 50
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288... 59
Balzac v. *Porto Rico*, 258 U. S. 298... 42, 46, 49, 51
Burke v. *Miltenberger*, 19 Wall. 519... 30
Burnet v. *Brooks*, 288 U. S. 378... 45
Callan v. *Wilson*, 127 U. S. 540... 63
Cincinnati Soap Co. v. *United States*, 301 U. S. 308... 44
Constantin v. *Smith*, 57 F. (2d) 227... 61
Cross v. *Harrison*, 16 How. 164... 62
District of Columbia v. *Clawans*, 300 U. S. 617... 63
District of Columbia v. *Colts*, 282 U. S. 63... 63
Dorr v. *United States*, 195 U. S. 138... 46, 50
Dowdell v. *United States*, 221 U. S. 325... 50
Downes v. *Bidwell*, 182 U. S. 244... 48, 52, 67
Franks v. *Smith*, 142 Ky. 232... 61
Gillis, In re, 49 Mont. 454... 61
Glockner, Ex parte (D. Hawaii)... 17
Grapeshot, The, 9 Wall. 129... 29, 62
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146... 59
Hirabayashi v. *United States*, 320 U. S. 81... 59, 64
Hawaii v. *Mankichi*, 190 U. S. 197... 40, 42, 42, 46, 48, 51
Honomu Sugar Co. v. *Sayewiz*, 12 Haw. Rep. 96... 42
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652... 50
Inter-Island Steam Nav. Co. v. *Territory of Hawaii*, 96 F. (2d), 412, 417, affirmed 305 U. S. 306... 32
Interstate Commerce Commission v. *B. & O. Ry.*, 145 U. S. 263, 284... 32
Jones, Ex parte, 71 W. Va. 567... 61
Kalanianaole, In re, 10 Hawaii 29 (1895)... 26, 31, 33, 60, 66
Kepner v. *United States*, 195 U. S. 100... 41, 50
King, The v. *Allen* [1921], 2 Irish Rep. 241... 34, 66
King, The (Childers) v. *Adjutant General* [1923], 1 Irish Rep. 5... 34
King, The O'Connell v. *Military Governor* [1924], 2 Irish Rep. 104... 34
Korematsu v. *United States*, 323 U. S. 214... 59
Krohn v. *Minister for Defense South African Rep.* (1915) App. Div. 191... 34

Cases—Continued. Page

Lavinder, Ex parte, 88 W. Va. 713 61
Leitensdorfer v. *Webb*, 20 How. 176 62
Luther v. *Borden*, 7 How. 1 ..... 27, 35, 59, 60
Mackenzie v. *Hare*, 239 U. S. 299 45
Marais, Ex parte (1902) A. C. 109 ..... 34, 66
Marlin v. *Lewallen*, 276 U. S. 58, 62 32
Martin v. *Mott*, 12 Wheat. 19 ..... 25, 27, 59, 67
McCardle, Exparte, 7 Wall. 506, 6 Wall. 318 62
Mechanics' etc. Bank v. *Union Bank*, 22 Wall. 276 ..... 29, 62
Merryman, Ex parte, Fed. Cas. No. 9487 27
Milligan, Ex parte, 4 Wall. 2 ..... 59, 60, 63, 64, 65, 67
Missouri v. *Ross*, 299 U. S. 72 41
Mitchell v. *Harmony*, 13 How. 115 ..... 35, 59
Mostyn v. *Fabrigas*, 1 Comp. 161, 98 Eng. Rep. 1021 (1774) 35
Moyer v. *Peabody*, 212 U. S. 78 ..... 27, 36, 60
Neagle, In re, 135 U. S. 1 77
Ocampo v. *United States*, 234 U. S. 91 ..... 48, 50, 51
Overstreet v. *North Shore Corp.*, 318 U. S. 125 32
Peacock & Co. v. *Rep. Hawaii*, 12 Haw. Rep. 27 42
Phillips v. *Eyre*, 4 Q. B. 225 (1869); 6 Q. B. 1 (1870) 34
Ponce v. *Roman Catholic Church*, 210 U. S. 296 41
Prize Cases, 2 Black 635 59
Public Utility Commrs. v. *Ynchausti & Co.*, 251 U. S. 401 42
Queen v. *Eyre*, 3 Q. B. 487 (1868) 34, 35
Quirin, Ex parte, 317 U. S. 1 ..... 21, 59, 60, 63, 64, 67
Rassmussen v. *United States*, 197 U. S. 516 ..... 46, 47, 51
Rep. Hawaii v. *Edwards*, 12 Haw. Rep. 55 42
Schick v. *United States*, 195 U. S. 65 63
Selective Draft Law Cases, 245 U. S. 366 59
Seifert, Ex parte (D. Hawaii) 17
State v. *Brown*, 71 W. Va. 519 61
Sterling v. *Constantin*, 287 U. S. 378 ..... 27, 35, 60, 61, 78
Territory v. *Ota*, 36 Haw. 80, 97–98 (1942) 32
Tiloako v. *Attorney General of Natal* [1907] A. C. 93 34
Trono v. *United States*, 199 U. S. 521 50
U. S. v. *Belmont*, 301 U. S. 324 ..... 44, 58
U. S. v. *Curtiss-Wright Corp.*, 299 U. S. 304 ..... 44, 58
United States v. *Fischer*, 280 Fed. 208 61
United States v. *Ryan*, 284 U. S. 167 32
United States v. *Wolters*, 268 Fed. 69 61
Vallandigham, Ex parte (C. C. S. D.-Ohio), Fed. Cas. 16816 59
Wolf Tone's Case, 27 St. Tr. 613 (1798) 34
Wright v. *Fitzgerald*, 27 St. Tr. 759 (1799) 35
Yeager, Ex parte, 8 Wall. 85 62
Zimmerman, Ex parte, 132 F. 2d 442, certiorari denied, 319 U. S. 744 ..... 18, 59

Ordinance, Constitution and statutes: Page

Ordinance of Northwest Territory, 1787, 32 Journals of the Continental Congress 334 (1787) 54

Constitution of the United States:

Article I:

Sec. 8 ..... 52, 58, 63, 80

Sec. 9 ..... 26, 42, 52, 80

Sec. 10 25

Article II, sec. 2 58

Article III, sec. 2 ..... 42, 62, 81

Article IV, sec. 3 ..... 44, 52, 81

Fifth Amendment 42, 81

Sixth Amendment 53, 62, 82

Tenth Amendment 53

Thirteenth Amendment 46

Eighteenth Amendment 46

Twenty-first Amendment 46

State Constitutions:

Maine (1820 and 1876), Art. I, Secs. 6, 14 58

Maryland (1867), Art. 32 58

Massachusetts (1780), Part of the First, Art. XXVIII 58

New Hampshire (1784), Part the First, Arts. 34, 51 58

South Carolina (1895), Art. I, Sec. 27 58

Tennessee (1834), Art. I, Sec. 25 58

(1870), Art. I, Sec. 25 58

Vermont (1793), Ch. I, Art. 17 58

Constitutions of Kingdom of Hawaii:

1852, Arts. 5, 6, 39 25

1864, Arts. 5, 37 25

1887, Arts. 5, 37 25

Constitution of Republic of Hawaii of 1894:

Art. 6 25

Art. 31 ..... 24, 30

Federal Statutes and Treaty:

Act of August 7, 1789, c. 8, 1 Stat. 50 54

Act of March 2, 1867, c. 153, 14 Stat. 428, sec. 3 61

Act of April 12, 1900, c. 191, sec. 17, 31 Stat. 81, 48 U. S. C. 771 26

Organic Act of Hawaii, Act of April 30, 1900, c. 339, 31 Stat. 141, as amended (48 U. S. C. 495, 532):

Sec. 5 ..... 19, 38, 39, 52, 82

Sec. 67 ..... 3, 19, 22, 24, 38, 39, 40, 41, 52, 62, 82

Act of August 29, 1916, c. 416, sec. 21, 39 Stat. 552, 48 U. S. C., sec. 1111 26

Act of June 22, 1936, c. 699, sec. 20, 49 Stat. 1812, 48 U. S. C., sec. 1405s 26

Articles of War, Art. 86, 10 U. S. C. 1558 71

Ordinance, Constitution and statutes—Continued
Organic Acts: Page
Alabama, 3 Stat. 371 (1817) 55
Alaska, 37 Stat. 512 (1912) 55
Arkansas, 3 Stat. 493 (1819) 55
Colorado, 12 Stat. 172 (1861) 55
Dakota, 12 Stat. 239 (1861) 55
District of Columbia, 16 Stat. 419 (1871) 55
Florida, 3 Stat. 654 (1822) 55
Hawaii, 31 Stat. 141 (1900), 36 Stat. 443 (1910) 55
Idaho, 12 Stat. 808 (1863) 55
Illinois, 2 Stat. 514 (1809) 55
Indiana, 2 Stat. 58 (1800) 55
Iowa, 5 Stat. 235 (1838) 55
Kansas, 10 Stat. 277 (1854) 55
Louisiana, 2 Stat. 331 (1805) 55
Michigan, 2 Stat. 309 (1805) 55
Minnesota, 9 Stat. 493 (1849) 55
Mississippi, 1 Stat. 549 (1798) 55
Missouri, 2 Stat. 743 (1812) 55
Montana, 13 Stat. 85 (1864) 55
Nebraska, 10 Stat. 277 (1854) 55
Nevada, 12 Stat. 209 (1861) 55
New Mexico, 9 Stat. 446 (1850) 55
Oklahoma, 26 Stat. 81 (1890) 55
Oregon, 9 Stat. 323 (1848) 55
Orleans, 2 Stat. 283 (1804) 55
Philippine Islands, 39 Stat. 545 (1916) 55
Puerto Rico, 39 Stat. 951 (1917); 41 Stat. 1096 (1921) 55
Territory South of the Ohio, 1 Stat. 106, 123 (1790) 55
Utah, 9 Stat. 453 (1850) 55
Virgin Islands, 49 Stat. 1807 (1936) 55
Washington, 10 Stat. 172 (1853) 55
Wisconsin, 5 Stat. 10 (1836) 55
Wyoming, 15 Stat. 178 (1868) 55
Rev. Stats. 1851, 1891 55
Treaty with France (1803), 8 Stat. 200 55, 56
Treaty with Russia of March 30, 1867, 15 Stat. 539 47, 48, 56
Treaty with Spain (1819), 8 Stat. 252 56
Statutes of Republic of Hawaii:
Act No. 18 of February 8, 1895 30, 32
Act No. 20 of March 15, 1895 30, 31, 32
Act No. 24 of March 15, 1895 30, 31, 32
Statutes of Territory of Hawaii:
Revised Laws of Hawaii, 1935, c. 166, secs. 5651, 5657 72
Proclamations:
Presidential Proclamation No. 2627 of October 24, 1944 (9 F. R. 12831) 7, 83

Proclamations—Continued Page
Governor of Hawaii's Proclamation of December 7, 1941 3, 23
Governor of Hawaii's Proclamation of February 8, 1943 5
Governor of Hawaii's Proclamation of October 24, 1944 85
General Orders of the Military Commander:
General Orders No. 2, March 10, 1943 6
General Orders No. 4, December 7, 1941 4
General Orders No. 29, December 16, 1941 4, 75
General Orders No. 57, January 27, 1942 5, 75
General Orders No. 133, August 31, 1942 5, 75, 86
General Orders No. 135, September 4, 1942 5, 75, 91
Congressional Materials:
Report of Hawaiian Commission, Sen. Doc. No. 16, 55th Cong., 3d sess., p. 35 31
Law Enforcement in the Territory of Hawaii, Sen. Doc. No. 78, 72d Cong., 1st sess., pp. x, 22, 116–117, 120 (1932) 73
Statehood for Hawaii, Sen. Doc. 151, 75th Cong., 3d sess. 43
Government for the Territory of Hawaii, H. Rep. No. 305, 56th Cong., 1st sess 26, 74
Miscellaneous:
Condert, Doctrine of Territorial Incorporation, 26 Col. L. Rev. 821 50
Crawford, Statutory Construction, 167 (1940) 41
Dodd, The Case of Marais, 18 L. Q. Rev. 143, 146–147 (1902) 66
Executive Order No. 9489 (9 F. R. 12831) 8
Fairman, The Law of Martial Rule (1943) 34, 60, 64, 67
Farrand, Records of the Federal Convention of 1787, Vols. 2 and 3 45
Hughes, War Powers Under the Constitution, Sen. Doc. 105, 65th Cong., 1st sess., pp. 12, 42, A. B. A. Rep. (1917) 232, 2 Mass. L. Q. 575 64, 66
King, Legality of Martial Law in Hawaii, 30 Col. L. Rev. (1942), 599 41, 77
Langdell, The Status of Our New Territories (1899), 12 H. L. R. 365 51, 52
Littlefield, *The Insular Cases*, 15 H. L. R. 169 51
8 Op. Atty. Gen. 365 60
12 Op. Atty. Gen. 182, 183, 199 29, 62
13 Op. Atty. Gen. 59 62
Pollock, The Law of Torts, pp. 123–124 (12th Ed. 1923) 34
Richards, Martial Law, 18 L. Q. Rev. 133, 141–142 (1902) 66
Stephen, History of Criminal Law of England, Vol. I, p. 215 (1883) 35
Sutherland, Statutory Construction, 5205 (3d Ed.) 41
Thayer, Our New Possession, 12 H. L. R. 464 51
Wiener, A Practical Manual of Martial Law, p. 16 (1940) 60, 67
3 Willoughby, Constitutional Law, p. 1602 67
Winthrop, Military Law and Precedents, p. 618 (2d Ed. 1920) 71

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OPINIONS BELOW

The opinion of the District Court (R. 389) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 1188) are reported at 146 F. (2d) 576.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 1232). The petition for a writ of certiorari was filed on December 29, 1944 and was granted on February 12, 1945 (R. 1234). The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a military provost court, established by the military commander under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532), had lawful power to try the petitioner, a civilian, for assault upon military sentries on a military reservation with intent to hinder them in the performance of their duties in violation of an order of the military commander which made such an assault, wherever committed within the Territory of Hawaii, a criminal offense triable in the provost court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix (*infra*, pp. 80–83).

STATEMENT

The petitioner was convicted on March 2, 1944, in the Provost Court for the Island of Oahu, Territory of Hawaii, for the offense of assaulting two United States Marine Corps sentries on February 24, 1944 (R. 380) at the main gate of the Navy Yard at Pearl Harbor on the naval reservation, with intent to hinder them in the lawful discharge of their duties, in violation of paragraph 8.01 of General Orders No. 2 of the

Military Governor of Hawaii, dated March 10, 1943 (R. 110).

Before stating the facts of the petitioner's case as brought forth in the provost court trial and at the hearing in this habeas corpus proceeding, it may be helpful to set forth the authority under which the provost court had been established and operated.

1. Martial law in Hawaii

Establishment of Martial Law.—On December 7, 1941, after the Japanese attack on Pearl Harbor, Governor Poindexter of Hawaii issued a public proclamation stating that pursuant to Section 67 of the Hawaiian Organic Act (*infra*, p. 82) the privilege of the writ of habeas corpus was suspended until further notice and the Territory was placed under martial law (R. 12–14). In that Proclamation the Governor also requested the Commanding General, Hawaiian Department, during the emergency and until danger of invasion was removed, to exercise all the powers normally exercised by the Governor and by the judicial officers and employees of the Territory and such other and further powers as the emergency might require (R. 13). On the same day the Governor telegraphed the President that he had declared martial law and suspended the privilege of the writ, and on December 9 the President telegraphed his approval of this action of the Governor (R. 61–62).

Following the Governor's proclamation on December 7, 1941, Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, issued a public proclamation declaring that in compliance with the aforesaid requests of the Governor he was assuming the position of Military Governor, that necessary ordinances governing the conduct of the people of the Territory would be published, and that offenders would be punished by military tribunals or held in custody until such times as the civil courts could function (R. 58–60). On the same day General Short issued General Orders No. 4, establishing a system of military courts to try civilians for violations of laws of the United States and of the Territory, and of rules, regulations, orders or policies of the military authorities, by the procedures prescribed for special and summary courts martial. (Pet. Brief, Appendix, p. iv).

On December 8, 1941, an order of the Chief Justice of the Supreme Court of the Territory stated that under the direction of the Commanding General all courts of the Territory would be closed until further notice (*White* v. *Steer*, No. 15 this Term, R. 81) and the civil courts were immediately replaced by provost courts (R. 594, 601).

Modification of Martial Law.—General Orders No. 29, dated December 16, 1941, authorized the civil courts of the Territory to open to a limited extent for the trial of limited classes of cases not

requiring jury trials or the subpoenaing of witnesses (*White* R. 82–85). General Orders No. 57, dated January 27, 1942, authorized the civil courts, as agents of the Military Governor, to exercise their normal functions except for jury trials, habeas corpus proceedings, and other specified classes of cases (*White* R. 86–88). General Orders No. 133, dated August 31, 1942, extended the jurisdiction of the civil courts to jury trials, and General Orders No. 135, dated September 4, 1942, enumerated the criminal offenses, involving crimes against the Government or related to the war effort, in respect of which the civil courts were not authorized to exercise jurisdiction (Appendix, pp. 86–94). From December 7, 1941, to January 30, 1943, General Orders Nos. 1 to 181 inclusive, were issued for the Territory of Hawaii (R. 46).

On February 8, 1943, Governor Stainback, who had succeeded Governor Poindexter, issued a public proclamation providing that, although martial law and suspension of the privilege of the writ of habeas corpus were to remain in effect, the Governor and other civilian officers and agencies would resume their respective jurisdictions with regard to various governmental functions, including criminal and civil judicial proceedings, except for criminal proceedings against members of the armed forces and civil suits against them for acts or omissions in the line of duty and criminal

prosecutions for violations of military orders, except as these exceptions might be waived by the commanding general in any particular case or class of cases (R. 70–74). On the same day, Lt. Gen. Emmons, who had succeeded Lt. Gen. Short as Commanding General and Military Governor, issued a public proclamation relinquishing to the Governor and other civilian officers of the Territory the functions set forth in the Governor's proclamation (R. 77–81). These proclamations, which were made effective on March 10, 1943, were issued after protracted conferences among the Governor and representatives of the Departments of War, Justice and Interior, held for the purpose of restoring civil functions to the civilian authorities as quickly as practicable under the circumstances (R. 74–75). The President indicated his approval of these proclamations in a letter to the Secretary of War (R. 75–76).

Pursuant to the Proclamations of February 8, 1943, General Emmons issued a revised set of General Orders Nos. 1 to 14, effective March 10, 1943, and rescinded General Orders Nos. 1 to 181, issued under the prior proclamations (R. 97–224, 226). General Orders No. 2 (R. 98–118) vested provost courts and military commissions with jurisdiction to try any case or proceeding involving violations by a civilian "of the rules, regulations, proclamations, or Orders of the Military or Naval authorities, or of the Military Governor of the Territory of Hawaii, or of the laws of

war," and to impose punishment by fine, imprisonment, or both (R. 99–100, 47–49, 98, 118). Lesser offenses were to be tried by provost courts (R. 101), which in adjudging sentences were to be guided, but not bound, by the penalties provided by the Courts-Martial Manual, the laws of the United States, the laws of the Territory of Hawaii, and the customs of law in like cases (R. 101). The maximum punishment for violation of General Orders not containing a different provision as to punishment, and the maximum punishment which a provost court could impose, was confinement with or without hard labor for a period not to exceed five years, or a fine not to exceed five thousand dollars, or both (R. 101, 104). Provost courts were authorized to admit to bail persons charged with offenses punishable by such courts (R. 104), and their procedure was to follow, so far as feasible, the procedure used in summary courts-martial (R. 105).

Termination of Martial Law.—The District Court on April 20, 1944, sustained the writ, and discharged the petitioner from custody on his own recognizance pending appeal (R. 402–403). Prior to entry of the decree of the court below on November 1, 1944 (R. 1232), reversing the judgment of the District Court, the President on October 19, 1944, issued Proclamation No. 2627 (App., p. 83), providing that, effective October 24, 1944, the privilege of the writ was restored and martial law terminated and directing the Governor of

Hawaii to issue a proclamation accordingly.[1] The Governor issued such a proclamation (App., p. 85).

2. Petitioner's provost court trial

A penal summons from the Military Governor to the petitioner, dated and served on February 29, 1944, commanded him to appear at the provost court at Pearl Harbor on March 1, to answer the charge of violating paragraph 8.01 of General Orders No. 2, which provided that no person should commit an assault on any military or naval personnel with intent to resist or hinder them in the discharge of their duty (R. 365–366). When the petitioner appeared in obedience to the summons, he was asked whether he desired counsel and whether he was ready to proceed with the trial; he stated that he did not desire counsel and was ready to proceed (R. 784). The trial was adjourned until March 2 because of the absence of the Government's witnesses (R. 785).

At the trial Corp. Robert Bowerman, United States Marine Corps Reserve, and Pvt. James C. Hunter, United States Marine Corps Reserve,

[1] In Executive Order No. 9489 (9 F. R. 12831), dated October 18 and effective October 24, 1944, the President also directed the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, which included the Territory of Hawaii, as a military commander within the meaning of the Act of March 21, 1942 (18 U. S. C. Supp. III 97a) with authority to designate the Territory or any part thereof as a military area and to prescribe regulations on such matters as blackout and curfew periods, air raid precautions, exclusion of individuals from the Territory, and possession of weapons.

testified to the petitioner's assault upon them on February 24, 1944, while they were on duty guarding the main gate of the Pearl Harbor Navy Yard (R. 367–377). The petitioner then testified on his own behalf (R. 378–379). On March 2 the court found the charges sustained by the evidence, adjudged the petitioner guilty, sentenced him to six months' confinement, and committed him to the custody of the respondent, Sheriff of the City and County of Honolulu, for execution of the sentence (R. 379–381).

3. The habeas corpus proceeding

The Pleadings.—On March 14, 1944, the petition for a writ of habeas corpus was filed in the United States District Court for the Territory of Hawaii alleging that the petitioner's trial and conviction by a provost court and his imprisonment were unlawful and unconstitutional in that there existed no real or apparent threat of invasion of Hawaii, that martial law did not lawfully exist within the Territory, and that irrespective of martial law there was no military necessity for the trial of the petitioner, a civilian, by a military tribunal (R. 4–8).

The respondent's return and answer to an order to show cause why a writ should not issue (R. 2, 25–38) admitted that the federal and territorial criminal and civil courts were functioning (R. 7, 27–28), but denied that the petitioner's trial and imprisonment were unlawful and unconstitutional

or that imminent danger of invasion had ceased or that martial law did not lawfully exist (R. 26–29). The return affirmatively alleged that under the proclamations of the Governor and Military Governor, issued on February 8, 1943, the suspension of the privilege of the writ and martial law continued and the civil courts were without jurisdiction to try violations of military orders (R. 70–74). The return further alleged, on belief and on information from the military authorities, that Hawaii had at all times since December 7, 1941, been in imminent danger of attack and that the public safety required the continued existence of martial law and suspension of the privilege of the writ (R. 43–44), that the provost courts were necessary and proper for the successful prosecution of the war (R. 47) and were established in good faith and in the honest belief that military necessity required them, and that the punishment in a provost court of persons assaulting military sentries in the performance of their duties with intent to obstruct them was not unreasonable or arbitrary (R. 54).

The petitioner's traverse, filed on April 4, 1944, denied the military necessity for the petitioner's trial by a provost court and the existence of any imminent danger of invasion, within the meaning of Section 67 of the Hawaiian Organic Act, at the time of the alleged offense and of the provost court trial (R. 384). Upon the argument on March 31, 1944, the District Court determined that

a writ should issue, returnable immediately. The respondent produced the petitioner in court. Thereupon the court ordered that the petitioner be released pending determination of the case on furnishing a bond of $500.00 (R. 415). It was stipulated that the return to the order to show cause and the traverse to this return should stand as a return to the writ and as a traverse to the return to the writ (R. 484–485).

The evidence produced at the hearing before the District Court on the issues raised by the petitioner may be conveniently divided into two parts, that relating to the question of imminent danger of invasion and the necessity for martial law, and that relating to the petitioner's assault on the Marine sentries and the provost court trial.

The Evidence as to the Military Situation.— The evidence bearing on the military necessity for martial law and on the question of imminent danger of invasion consisted principally of the testimony of Admiral Chester W. Nimitz, Commander in Chief of the Pacific Fleet and of the Pacific Ocean Areas, Lt. Gen. Robert C. Richardson, Jr., United States Army, then Commanding General of the Central Pacific Area, and Governor Ingram M. Stainback.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Navy in the Pacific Ocean at that time, and that despite daily

searches a Japanese surprise carrier attack on the Hawaiian Islands was within the enemy's capabilities (R. 1073–1076). He testified that while invasion by seaborne troops in sufficient number to seize a beachhead was not probable, invasion by submarine, commando raiders and espionage parties was imminent and constantly impending, as well as invasion by carrier-borne aircraft (R. 1078).

General Richardson testified that the Hawaiian Islands are within the theatre of operations of the Pacific Ocean Areas, which is an active theatre of war (R. 1011), and that the Islands constitute the apex of a bastion, composed also of Alaska and the Panama Canal, upon which the safety of the West Coast of the continental United States depends (R. 1011–1012). He reviewed the Japanese military actions which had taken place in the Territory from the beginning of the war (R. 1013–1015). He testified that the Japanese fleet was still capable of making a surprise attack upon Oahu by the use of air or undersea craft, and that the danger of this type of invasion was always impending and imminent even though the Japanese might not be capable of landing a large land-based force for the purpose of seizing the Islands (R. 1030–1031). He testified that Pearl Harbor is the most attractive target for the Japanese enemy because it is the base of the Pacific Fleet, and that it was likely that Japan would take the risk of launching an attack be-

cause of the attractiveness of the target and the considerable damage which might be inflicted (R. 1016–1018, 1031–1042). He stated that the Japanese fleet had the capability of launching an attack on Oahu and there was danger of such a surprise attack because it was impossible to patrol the whole surface of an area as large as the Pacific Ocean and because a Japanese carrier force could move close to Oahu without detection under cover of a "cold front", a large zone of mist which is a very common weather phenomenon in the area (R. 1049).

Besides the possibility of striking from carriers, the Japanese could make use of submarines by which they could approach at night, launch boats, and send parties ashore in order to secure information of great military value or to attack important installations (R. 1019–1021). In this connection General Richardson pointed out that the probability of such attacks and their success was increased by the presence of disloyal individuals among the population of the Islands. He stated that although the persons of Japanese ancestry comprising one-third of the total population of 400,000 were, for the most part, entirely loyal, it was believed that there were some potentially disloyal individuals among them. Some of the disloyal individuals, aliens and citizens alike, had been detected and interned. It was apprehended that undetected disloyal persons would assist the enemy if an opportunity was presented,

by supplying military information and in other ways. (R. 1020–1025.)

General Richardson emphasized in his testimony the fact that the successes of our fleet had not removed the imminent danger of invasion but, on the contrary, had increased it because these success made it more imperative for the enemy to repeat its former successful invasion of the base, so necessary for the successful operation of the fleet (R. 1025–1026).

On the question of the military necessity for provost courts, General Richardson testified that the discharge of his responsibility for military security required a method of enforcement of military security regulations which was prompt and subject to his immediate control and authority, and that under martial law the provost courts provided such a method of enforcement. Speedy trial and punishment were deemed important in the enforcement of martial law. (R. 1026–1030.) He testified that in carrying out his responsibilities for military security he should not be required to rely upon other agencies for the enforcement of his security measures (R. 1052), and that the failure of the civil courts to deal adequately with violations of military security orders deemed necessary by the military commander would diminish his authority and his ability to discharge his military responsibilities (R. 1057). He testified that a military trial for the offense involved here was necessary in order

to uphold the authority of military sentries who were charged with important military duties (R. 1050–1051). In this case the sentries were on duty at the main gate of the Pearl Harbor Navy Yard checking and preventing disturbances at a busy period of the evening (R. 779, 798–799, 898–899).

On cross-examination General Richardson brought out that he had considered very carefully the abolition of the provost courts but finally concluded that offenses against military orders, such as the order here involved, which was considered essential to security and the substance of which was not embraced within the civil laws relating to assault and battery, should be triable by the provost courts in order to give effect to his military responsibility (R. 1065).

Governor Stainback testified that in his opinion public safety did not require the suspension of the privilege of the writ of habeas corpus and that there was no imminent danger of invasion (R. 826) and no military necessity for the trial of civilians in provost courts for offenses other than crimes against the laws of war (R. 825–828, 898–899). Judge Albert M. Cristy of the Circuit Court of the Territory testified that he did not believe that any reason existed except military orders for the failure of the civil courts to resume the conduct of their business within a few weeks after the Pearl Harbor attack (R. 603–608).

The Provost Court Trial.—The petitioner testified that he did not assault the two marine sentries.[2] The testimony of the sentries, however, was that the offense had been committed (R. 802–901). The petitioner challenged (R. 530) the correctness of the transcript of the testimony in the provost court, annexed to the return (R. 367–379), in his testimony in support of the allegation of the petition that he was tried upon a false charge in a provost court and was tried without counsel (R. 5–6). The accuracy of the transcript was established by the testimony of the court stenographer (R. 782–798), the provost court judge (R. 942), and Corp. Bowerman and Pvt. Hunter (R. 801, 899).

Captain J. Frank Wickhem, who served as Provost Court Commissioner for the Territory of Hawaii, in his testimony explained the procedure in the provost court. After a citation by the shore patrol, the military police, or the civil police, directed to the defendant, he was requested or

[2] The Government objected to the petitioner's testimony on the question whether the assault in fact occurred, on the basis of the clearly established rule that the only question in habeas corpus proceedings is whether the military tribunal had jurisdiction over the offense charged (R. 507–516). The petitioner argued, however, that the evidence would show that he had not in fact violated the General Orders and therefore the provost court lacked jurisdiction (R. 507–508). Thereupon the District Court overruled the Government's objection and allowed the testimony; the Government introduced evidence as to the offense because it was unwilling to permit the petitioner's testimony that he had been falsely accused and unfairly tried in the provost court to go unchallenged on the record.

summoned to appear at the civil police station within 48 hours for booking; the charge was drawn, signed and verified; the defendant was then brought into court, arraigned, and informed that he had the right to counsel and to call or subpoena witnesses; and the trial then commenced if the defendant stated he was ready. The trial was conducted according to the rules of evidence; the judgments were reviewed by officers on the staff of the Commanding General who could reduce any sentence or remit the fine (R. 910–912). The provost court judges were qualified attorneys, some of whom had had experience as judges in civil courts (R. 996–1001).[3]

The Rulings Below.—The District Court held that the Governor's proclamation of February 8, 1943, terminated the suspension of the privilege of the writ of habeas corpus (R. 395), relying on its earlier unreported decisions in *Ex parte Glockner* and *Ex parte Siefert*.[4] It held that the Con-

[3] The petitioner's trial in the provost court was before Lt. Commander Arthur L. Mundo, a member of the bar of California as well as of this Court, who served from 1932 to 1942 as a judge of the Superior Court of the State of California, until he was recalled to active duty in the Navy (R. 940–941).

[4] These cases were dismissed by the District Court as moot because the petitioners, naturalized United States citizens of German ancestry interned as dangerous, were removed to the West Coast of continental United States and released. A petition for a writ of certiorari to review a decision (132 F. (2d) 442) upholding the legality of suspension of the privilege of the writ and the internment of another United States citizen as dangerous in Hawaii, was denied by this Court

stitution of the United States and the Hawaiian Organic Act authorize martial law only when conditions of disorder disrupt the orderly conduct of civil government (R. 398); that during 1943 and thereafter the civil government of Hawaii was fully capable of efficient operation; that although on March 2, 1944, and thereafter the Island of Oahu may have been subject to attack, it was not subject to imminent danger of invasion by hostile forces; and that martial law did not therefore lawfully exist and the provost court possessed no authority to try the petitioner (R. 401–402).

The Circuit Court of Appeals for the Ninth Circuit, in an opinion by Judge Healy, held that the military authorities were authorized to prescribe offenses interfering with military security and to make violations triable in military tribunals, and that the petitioner's imprisonment was therefore lawful (R. 1207–1208). In view of this conclusion as to the legality of the imprisonment, Judges Healy and Garrecht found it unnecessary to decide whether the emergency existing in the Territory as of the time of the filing of the petition was such as to warrant the then suspension of the writ (R. 1192). Judge Wilbur, in a concurring opinion in which Judge Matthews joined, also stated that the suspension of the privilege of the writ was lawful, and furnished an additional ground for reversal of the District Court's order (R. 1209). In a

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on the ground that release of the petitioner on the mainland made the case moot. *Zimmerman* v. *Walker*, 319 U. S. 744.

separate opinion Judge Denman held that the petition should be dismissed because on its face it failed to show facts warranting issuance of a writ (R. 1224).

SUMMARY OF ARGUMENT

The scope of martial law authorized by Section 67 of the Organic Act of Hawaii includes trial of petitioner's offense in a provost court. The Constitution of the Republic of Hawaii, which contained the provision for martial law adopted by Congress in Section 67, was authoritatively construed by the Supreme Court of the Republics to authorize the military authorities under a declared state of martial law to take all actions deemed necessary or appropriate to meet the emergency, including military trials, and the action taken is subject to judicial review only for an abuse of discretion. Other common law authorities support this view that in the absence of constitutional limitations military action under an authorized and declared state of martial law is subject to judicial review only for an abuse of discretion. In adopting the language of the Constitution of the Republic of Hawaii Congress authorized martial law to this extent. The facts amply prove that there was no abuse of discretion in providing for the trial of petitioner's offense in the provost court in such a crucial strategic military area as the Territory of Hawaii.

The Constitution, as extended to Hawaii by the general provision of Section 5 of the Organic

Act, does not limit or restrict the scope of martial law specifically authorized by Section 67. The Constitution extends to a Territory only to the degree that Congress extends it. There is nothing in the doctrine of incorporated territories which prevents Congress, in incorporating a territory and extending the Constitution to it, from qualifying that incorporation and extension so that martial law in such a territory will not be subject to the same constitutional restrictions as martial law in a State.

Even if the Constitution applies fully to Hawaii, the exercise of the federal powers here involved was required by military necessity and therefore was constitutional. The courts will not substitute their judgment for that of the war-making branches of the Government on the question of the steps which are necessary in the prosecution of the war. Since it cannot be said that it was unreasonable for the military authorities to conclude that trial of petitioner's offense in a provost court was required by military security, such a trial was constitutional and is not prohibited by the Fifth or Sixth Amendments.

ARGUMENT

The question on which all of the judges of the court below were in agreement was that the provost court had jurisdiction to try the offense with which the petitioner was charged. If this Court affirms on that ground there will be no occasion

to consider any question as to the legality of the suspension of the privilege of habeas corpus. *Ex parte Quirin*, 317 U. S. 1, 25. If, however, the Court concludes that the military tribunal lacked jurisdiction and that the petitioner is therefore unlawfully held in custody, there will no longer be any reason why the petitioner should not be released on habeas corpus. As has been stated (*supra*, p. 7), the suspension of the privilege of the writ has been terminated, and the Government would not oppose discharge of the petitioner if he should be found to be entitled to his liberty. The question presented, therefore, is whether the provost court had jurisdiction to try the offense charged.

The petitioner contends (I) that jurisdiction of a martial law tribunal over a civilian for an offense such as that here involved is prohibited by the federal Constitution except in case of some urgent necessity not present here, and (II) that the Hawaiian Organic Act does not limit or modify the application of this constitutional prohibition in the territory and does not authorize trial of the petitioner's offense by a provost court. The Government contends (I) that the Organic Act authorized petitioner's trial by a provost court, and the Constitution, as extended to Hawaii, did not forbid the trial and (II) that the Constitution, if fully applicable to Hawaii, does not prohibit such a trial.

I

The Hawaiian Organic Act authorized petitioner's trial in a provost court

Section 67 of the Hawaiian Organic Act (Appendix, pp. 82–83) provides in part:

> * * * whenever it becomes necessary he [the Governor of Hawaii] may call upon the commanders of the military and naval forces * * * to prevent or suppress lawless violence, invasion, insurrection, or rebellion * * *, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

The statutory prerequisites for placing the Territory of Hawaii under martial law are "rebellion or invasion, or imminent danger thereof, when the public safety requires it".[5] Section 67 also provides that the Governor may place the Territory under martial law only "until communica-

[5] Section 67 also provides that "whenever it becomes necessary" the Governor may call on the military and naval forces to prevent or suppress violence, insurrection or rebellion. It appears to be immaterial, as a matter of statutory construction, whether this statutory requirement of necessity limits the Governor's authority to place the Territory under martial law, because if the statutory requirement of public safety is satisfied, the more general requirement of necessity is also satisfied.

tion can be had with the President and his decision thereon made known."

Pursuant to the statute Governor Poindexter, on December 7, 1941, issued the proclamation (R. 12–14) placing the Territory under martial law, suspending the privilege of habeas corpus, and stating that invasion had occurred and that the public safety required his action. This proclamation expressly authorized and requested the military commander to exercise the powers of the Governor, judicial officers, and employees of the Territory during the emergency and until removal of the danger of invasion. Pursuant to the statute the Governor telegraphed the President that he had placed the Territory under martial law and had suspended the privilege of the writ of habeas corpus. The President telegraphed his approval of this action under the statute (*supra*, p. 3).

The petitioner does not assert that the attack on Pearl Harbor did not satisfy the statutory requirements and warrant suspension of the writ and placing the Territory under martial law on December 7, 1941, or challenge the continuance of martial law, in respects which are not material here, down to the date of the trial. The first issue is whether Congress, by authorizing martial law, authorized trial of petitioner's offense in a martial law tribunal on March 2, 1944. The petitioner contends that the establishment of martial

law under the statute did not authorize trial of petitioner's offense, which is asserted not to be related in any way to invasion or imminent danger thereof, in a provost court on March 2, 1944. The Government contends (A) that the invocation of martial law under the statute fully authorized such a trial and (B) that the constitution as extended to Hawaii did not prohibit it.

A. THE STATUTORY POWER TO DECLARE MARTIAL LAW EMBRACED AUTHORITY FOR THE MILITARY TRIAL OF PETITIONER'S OFFENSE.

The view that a military trial of petitioner's offense was authorized by Congress is supported both by the meaning given to the statutory language by the Supreme Court of the Republic of Hawaii before the language was adopted by Congress, and by the meaning given to martial law in other decisions and in the general authorities.

1. Plenary power to establish and exercise martial law, as previously authorized by the Hawaiian Constitution, was conferred by Congress.

a. Hawaiian judicial and legislative precedents indicate that martial law was understood to include power to provide for the military trial of an offense of the character here involved. The pertinent language of Section 67 of the Hawaiian Organic Act was taken practically verbatim from Article 31 of the Constitution of 1894 of the Republic of Hawaii which provided that the President might "in case of rebellion or invasion, or imminent danger of rebellion or invasion, when

the public safety requires it, suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law." The reasons for changing the language of earlier constitutions[6] to include a reference to "imminent danger of rebellion or invasion" are not revealed but doubtless are to be found in the experience of the residents with rebellion in the Islands.[7] This constitution had no provision for jury trial. Article 6, Section 1, provided that no person shall be subject to punishment for an offense except on conviction "by a tribunal having jurisdiction of the case."[8]

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[6] Article 39 of the Constitution of 1852 of the Kingdom of Hawaii, and Article 37 of the 1864 and 1887 Constitutions provided that the King "in case of invasion or rebellion, can place the whole Kingdom, or any part of it under martial law; * * *". Article 5 of each of these Constitutions provided that the privilege of habeas corpus shall not be suspended "unless by the King, when, in case of rebellion or invasion, the public safety shall require its suspension".

[7] Similar language is noted in Article I, Section 10 of the United States Constitution which provides that "No State shall, without the Consent of Congress, * * * engage in War, unless actually invaded or in such imminent Danger as will not admit of delay." The Act of 1795 authorized the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion * * *". *Martin* v. *Mott*, 12 Wheat. 19, 28.

[8] Article 6 of the 1852 Constitution provided that the right of jury trial, "in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever". Article 6 of the 1864 and subsequent Constitutions, however, substituted for this provision the provision quoted from the 1894 Constitution concerning conviction in a court having jurisdiction of the cases.

The legislative history of the bill which became the Hawaiian Organic Act does not discuss Section 67 or indicate why the language of the Hawaiian Constitution of 1894 with respect to imminent danger of invasion was adopted instead of the language of Article I, Section 9, of the United States Constitution relating to suspension of the privilege of the writ in cases of rebellion or invasion.[9] It is worthy of note, however, that the same language was subsequently used in organic legislation affecting Puerto Rico (Apr. 12, 1900, c. 191, § 17, 31 Stat. 81, 48 U. S. C. 771), the Philippine Islands (Aug. 29, 1916, c. 416, § 21, 39 Stat. 552, 48 U. S. C. 1111), and the Virgin Islands (June 22, 1936, c. 699, § 20, 49 Stat. 1812, 48 U. S. C. 1405s). Evidently specific criteria for the establishment of martial law and, we submit, for its exercise in the territories in question are intended by this language. The key to its meaning is given in part in the leading case which arose in Hawaii under Article 31 of the Constitution of 1894.

In the case of *In re Kalanianaole*, 10 Hawaii 29 (1895), the Supreme Court of the Republic of Hawaii dismissed a writ of habeas corpus and upheld the jurisdiction of a military commission to try and convict a citizen of the Republic for the crime of misprision of treason during a period of martial law and suspension of the writ declared under Article 31 of the 1894 Constitution in con-

[9] *Government for the Territory of Hawaii*, H. Rep. No. 305, 56th Cong., 1st Sess.

nection with the rebellion of 1895 which sought to restore the monarchy. During the period of martial law, proclaimed on January 7, 1895, and terminated on March 18, 1895, the petitioner was sentenced to imprisonment for one year by the military commission. After martial law was terminated and habeas corpus restored, he sought his discharge on the ground that the military commission lacked jurisdiction.

The petitioner contended that the military commission lacked jurisdiction to try a civilian for misprision of treason, on the ground that the offense was not one against the laws of war (10 Haw. at 47). The court held that Article 31 of the Constitution expressly granted the President the power to place the Republic under martial law and in such a case "the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance" (10 Haw. 53).[10]

[10] For this view of the complete discretion committed to the President of the Republic by the Constitution the court relied in part upon the views on the complete discretion of the Legislative and Executive in dealing with rebellion or invasion, expressed in *Luther* v. *Borden*, 7 How. 1; *Martin* v. *Mott*, 12 Wheat. 19; and *Ex parte Merryman*, Fed. Cas. No. 9487.

The subsequent decisions of *Sterling* v. *Constantin*, 287 U. S. 378, and *Moyer* v. *Peabody*, 212 U. S. 78, also affirm the conclusiveness of the determination of the Executive that a state of martial law is necessary. The court in the *Sterling* case proceeded to determine that the particular purported exercise of martial law there involved was subject to and

The court then distinguished between the martial law there involved, which was established pursuant to the express grant of constitutional power to the President in Article 31, and an exercise of martial law in the absence of such a direct grant of power. The latter, but not the former, is justified and limited by necessity which is reviewable in the courts.[11] On the question

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prohibited by the Fourteenth Amendment. But, it is contended *infra* that there is no constitutional prohibition applicable in this case.

[11] The court stated (10 Haw. 53–54):

"Thus, as we have seen, where there is an express grant or recognition of power, the person upon whom it is conferred is sole judge of the necessity of exercising it. And it is obvious that by the same reasoning, the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance.

"In thus holding, we do not wish to be understood as of the opinion that the circumstances of this case would not have justified the proclamation of martial law, were there no express constitutional provision authorizing it. On the contrary, the rulings of the United States courts would seem fully to justify such a course, as an incident of general war power, or on the ground of necessity. It is true that in both the State and Federal Courts, opinions have been expressed to the effect that in the absence of a direct grant of power, martial law is justified and therefore limited by necessity, and that while the executive or legislative branch of the government may by force pass upon the question of necessity in the first instance, their judgment is subject to review by the courts afterwards. See, *Ex parte Milligan*, 4 Wall. 2; *In re Kemp*, 16 Wis. 382; *Griffin* v. *Wilcox*, 21 Ind. 370; *Johnson* v. *Jones*, 44 Ill. 142. But, although this view may be correct on general principles, and even valuable as a cautionary or preventive influence, it has, in fact, been of little value in practical application to specific cases. For, in the cases in which such opinions have been expressed, martial

whether the scope of martial law included a military trial of petitioner's offense, the Court stated that military judgment of what is necessary or appropriate in any particular exigency is subject to review by the courts "only in case of abuse of power, in which case the military may be said to be acting outside of its jurisdiction" (10 Haw. 57), and that "acts done under martial law are not reviewable in the courts, but that neither a prior authorization of martial law nor a subsequent ratification by an act of indemnity of the usual form justifies acts of cruelty or inhumanity" (10 Haw. 58). The court further stated that the power to try by military commission is "not confined to cases connected with the war or insurrection" (10 Haw. 59).[12]

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law had not been proclaimed, and the acts in question were attempted to be justified solely on the ground that martial law existed in fact though not proclaimed. In such cases, the courts might well inquire into or take judicial notice of the facts, for there is nothing else to go by, and in those cases they were of the opinion that there was no basis for the claim made. But where there was ground for a reasonable difference of opinion, or rather where the executive or legislative branch of the government has declared or authorized the declaration of martial law, the courts have invariably, so far as we are aware, refused to interfere, whether on the ground that these were questions of a political nature and therefore outside of their jurisdiction, or questions upon which the courts thought the other branches of government more competent under the circumstances to form a correct judgment, or not."

[12] The court relied in part on establishment of provisional courts in parts of the United States during and after the Civil War and cited *Mechanics' etc. Bank* v. *Union Bank*, 22 Wall. 276; *The Grapeshot*, 9 Wall. 129; and 12 Op. Atty. Gen. 183, 199.

In disposing of the contention (10 Haw. 47) that the military commission lacked jurisdiction to try any offense after actual hostilities ceased and while the courts were open, the court held that the state of war continued beyond actual hostilities, martial law continued in force, and the military jurisdiction was in legal contemplation an impediment to the jurisdiction of the courts (10 Haw. 61–62).[13]

Petitioner here contends (Br. 41) that the *Kalanianaole* decision is of no significance in interpreting Section 67 of the Organic Act because a legislative act of the Republic of Hawaii prior to the military trial of Kalanianaole provided for carrying out the sentences of the military commission and thus retroactively authorized the commission (Act 18 of February 8, 1895) and also because subsequent enactments ratified and granted immunity for acts done under martial law (Acts 20 and 24 of March 15, 1895). These legislative enactments, however, do not in any way minimize the authoritative judicial interpretation of the meaning of martial law as authorized in Article 31 of the 1894 Constitution, but, on the contrary, constitute a legislative interpretation of Article 31. Section 1 of Act 20 expressly provided that "all acts * * * done * * * by

[13] The court relied upon the analogy of the provisional courts established after the cessation of hostilities in the Civil War. *Burke* v. *Miltenberger*, 19 Wall. 519. See also the discussion of the open court doctrine *infra*, pp. 64–66.

any officer of the Government, or other person acting under the authority of the President * * * until martial law shall be declared to be no longer in force * * * in the proclamation or furtherance of martial law, or in the suppression of insurrection, or in the establishment of a military tribunal, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason * * * *or with any act or conspiracy dangerous to the peace or to the safety of life or property* * * * are hereby declared to have been done within the constitutional authority of the President and are confirmed."[14] [Emphasis supplied.]

It is also to be noted that Justice Frear, who rendered the unanimous opinion of the court in the *Kalanianaole* case expounding the extent of martial law under Article 31, was one of the five Commissioners appointed by the President to recommend legislation for Hawaii, pursuant to the Joint Resolution of July 7, 1898, for the annexation of Hawaii. Section 69 of the bill recommended by the Commission in its report to the President contains the language which became Section 67 of the Organic Act.[15] Another member of the Commission which recommended enactment

[14] Act 24 uses the same language in granting immunity from suits. *Acts of the Executive and Advisory Councils of the Republic of Hawaii* (1895) reprinted in petitioner's brief, Appendix xi to xiv.

[15] *Report of Hawaiian Commission*, Sen. Doc. No. 16, 55th Cong., 3d Sess., p. 35.

of Section 67 was Sanford B. Dole, President of the Republic of Hawaii, who approved Acts 18, 20 and 24, *supra,* p. 30, and who established the military commission which tried Jonah Kalaniana'ole, and approved the proceedings, findings and sentence with a modification of the sentence. Thus it would appear that this language, proposed by the Commission and adopted by Congress, was intended to bear the interpretation previously placed upon it by the Supreme Court of the Republic of Hawaii and that when Congress adopted the language it adopted the construction previously placed upon it by the Supreme Court and by the Executive and Advisory Councils of the Republic of Hawaii.

This, we submit, is an appropriate case for the application of the familiar rule of statutory construction that legislative adoption of statutory language which has been authoritatively construed indicates the legislative intent to adopt the accepted construction. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 131–132, *United States* v. *Ryan,* 284 U. S. 167, 175; *Marlin* v. *Lewallen,* 276 U. S. 58, 62; *Interstate Commerce Commission* v. *B. & O. Ry.,* 145 U. S. 263, 284; *Territory* v. *Ota,* 36 Haw. 80, 97–98 (1942). This is also an appropriate case for the application of the rule that the practical construction of a constitutional provision by the legislature should be given great weight by the judiciary. *Inter-Island Steam Nav. Co.* v.

Territory of Hawaii, 96 F. (2d) 412, 417 (C. C. A. 9), affirmed, 305 U. S. 306.

It is evident, we think, that the martial law power conferred by Section 67 of the Organic Act is of the broad scope defined in the *Kalanianaole* decision which rests, in turn, upon English and American authorities. We turn, then, to a review of these authorities with reference to the martial law concept as it exists apart from the limitations contained in the Federal Constitution.

b. In cases not involving constitutional provisions requiring judicial review of the reasonableness of military action, which are discussed *infra*, pp. 57–67, judicial decisions generally support the view expressed in the *Kalanianaole* case that under a state of martial law, declared pursuant to legislative authority, military tribunals have jurisdiction to try civilians not only for treason and other offenses related to belligerency, but also for other penal offenses when executive authorities determine that the military emergency requires such a course. It is true that usually the reported opinions of the civil courts, reviewing military action, are in cases of treason or other offenses indicating aid to, or sympathy with, enemies or rebels. The reasoning of the decisions, however, is that under a proclaimed state of martial law, during a state of war or insurrection, the military authority's decision on measures to be taken, including military trials, will not be disturbed in the absence of abuse of martial law powers.

In modern times in England, as in this country, the martial law power has been viewed as operative both in time of foreign war and during domestic disturbances of sufficient gravity. In habeas corpus proceedings to test the jurisdiction of military tribunals to try and punish civilians for crimes, the rule has been evolved abroad that a court is not bound by the military commander's assertion that a state of war or of sufficient disorder exists, although it will give great weight to his views in making its determination; but if circumstances warranting martial law are found to exist, the courts hold themselves powerless during hostilities to interfere with particular acts of military authorities. *Tilonko* v. *Attorney General of Natal* [1907] A. C. 93, 461; *Ex parte Marais* [1902] A. C. 109; *The King (O'Connell)* v. *Military Governor* [1924] 2 Irish Rep. 104; *The King (Childers)* v. *Adjutant General* [1923] 1 Irish Rep. 5; *The King* v. *Allen,* [1921] 2 Irish Rep. 241; *Krohn* v. *Minister for Defense, South African Rep.* [1915] App. Div. 191; cf. *Wolf Tone's Case,* 27 St. Tr. 613 (1798); Fairman, *The Law of Martial Rule* (1943), pp. 143–145. The modern practice of passing indemnity legislation which is conclusive on the courts explains the absence of any recent authoritative decision on the common law as to the extent of justification necessary for an exercise of martial law. *Phillips* v. *Eyre,* 6 Q. B. 1 (1870); 4 Q. B. 225 (1869); *Queen* v. *Eyre,* 3 Q. B. 487 (1868); Pollock, *The Law of Torts* (12th ed.,

1923), pp. 123–124. Earlier authorities, however, indicate that an official may be held responsible for a gross abuse of discretion in the exercise of martial law powers. *Wright* v. *Fitzgerald,* 27 St. Tr. 759 (1799); *Queen* v. *Eyre, supra* (charge to grand jury by Blackburn, J., reported in Finlason, *Report of the Case of Queen* v. *Eyre,* 1868); *Mostyn* v. *Fabrigas,* 1 Cowp. 161, 98 Eng. Rep. 1021 (1775); Stephen, *History of Criminal Law of England,* vol. I, p. 215 (1883).

American decisions, not involving the scope or exercise of the martial law powers of federal authorities (*Sterling* v. *Constantin, supra*), also lay down the rule that the legislative and executive authorities, not the courts, determine what degree of force a crisis demands and whether martial law is required, but that "if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable". *Luther* v. *Borden, supra* (7 How. at 44–45);[16] cf. *Mitchell*

[16] In *Luther* v. *Borden*, Rhode Island's original royal charter of 1663, retained as its basic law, expressly authorized the duly appointed military commander in time of war to "use and exercise the law martial in such cases only as occasion shall necessarily require" (7 How. 68). An Act of the General Assembly of the State on June 25, 1842, provided that the State "is hereby placed under martial law . . . (7 How. 8). This Court affirmed a judgment of the Circuit Court for the District of Rhode Island for defendant in an action for trespass by one arrested and detained by the state military authorities as a person aiding the Dorr Rebellion.

v. *Harmony*, 13 How. 115. And even where constitutional protection under the Fourteenth Amendment is invoked it has been stated that a Governor is not liable in damages for arrests made under martial law "in good faith and in the honest belief that they are needed in order to head the insurrection off * * *". *Moyer* v. *Peabody*, 212 U. S. 78, 85.

It is submitted, therefore, that under a declared state of martial law authorized by Congress in Hawaii, the establishment of a military tribunal for an offense such as is involved in this case is a valid exercise of military authority where, as here, such a tribunal was established in good faith and no abuse of discretion occurred in the particular case. It is not within the province of a court in a habeas corpus proceeding to go further in reviewing what was done than to determine whether abuse was committed.

2. *The petitioner's provost court trial did not involve an abuse of discretion*

The facts already reviewed with respect to martial law in Hawaii and the provision for a provost court trial of petitioner's offense amply demonstrate that no abuse occurred. It is not charged that personal discrimination was practiced as against the defendant. With respect to the general provision that was made for military trials, it is evident that the most careful consideration was accorded by responsible officials, civil and military, to the handling of the problem.

The initial decision to establish martial law, entirely replacing the civil government, was made by the Governor, the official chargeable with responsibility under the Organic Act, and was confirmed by the President, who reviewed the matter pursuant to the statutory provision (see *supra*, p. 3). The modification of martial law on February 8, 1943, which left offenses such as petitioner's subject to provost court trial, was determined after careful consideration by the Governor, the President, representatives of the responsible departments of the Federal Government, and the military authorities themselves (*supra*, pp. 5–6). The Governor, pursuant to his statutory responsibility, embodied the modification into a public proclamation (R. 70–74).

The fact that the personal judgment of Governor Stainback was that no need existed for a continuance of martial law in February, 1943, or afterward (R. 828) does not militate against the validity of his official action, into which many judgments necessarily entered. His assumption of official responsibility for the result reached is completely effective without reference to his personal views.

In the face of this record, it is impossible to contend that petitioner's trial was the result of arbitrary or capricious official action. The determination to retain martial law, including military trial of offenses such as petitioner's, was made in the presence of a military situation which

continued to threaten danger from the enemy to the Hawaiian Islands, the key base for military and naval operations in the Pacific (see the testimony of Admiral Nimitz and General Richardson, referred to *supra,* at pp. 11–14). It embodied the military judgment of General Richardson, the responsible commander, that provost court trials, to the extent retained, were vital to the military operations for which he was responsible (see, *supra,* pp. 14–15). Under the test of the validity of the exercise of martial law powers, prevailing in Hawaii under the Organic Act, there can be no question that petitioner's trial and sentence were free of abuse. The procedure accorded him was, on the contrary, the product of the most responsible judgment of all of the officials who were charged with the duty of safeguarding the Hawaiian Islands, providing for peace and good order within them during the prosecution of the war with Japan to a successful conclusion.

B. THE CONSTITUTION, AS APPLICABLE TO HAWAII, DID NOT PROHIBIT THE EXERCISE OF MARTIAL LAW HERE INVOLVED

The petitioner argues, notwithstanding the foregoing, that Section 67 of the Organic Act is limited by Section 5; that Section 5 extended the Constitution to the Territory of Hawaii in all particulars (except certain political provisions not here involved); and that the Constitution prohibited the provost court trial of petitioner's

offense even under the state of martial law declared pursuant to the statute. The Government contends that Section 5 of the Organic Act, extending the Constitution to the Territory in general language, was not intended to and did not nullify or limit an exercise of martial law authorized by the subsequent specific provision of Section 67 of the same Act which expressly provided for martial law in case of imminent danger of invasion. Hence the Constitution as extended to the Territory by the Congress did not prohibit a provost court trial of the offense here involved. It is further contended below that even if the Constitution applies to the exercise of martial law in the Territory as it does in the States, petitioner's trial was valid.

1. *Sections 5 and 67 of the Organic Act, read together, are not intended to extend to the Territory any constitutional prohibition against the petitioner's provost court trial*

Section 5 in its relevant part (as amended by Section 1 of the Act of May 27, 1910, c. 258, 36 Stat. 443, which added the phrase "including laws carrying general appropriations") provides as follows:

> That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said territories as elsewhere in the United States * * *

Section 67 provides:

> That the governor * * * may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

The treatment of an analogous problem of construction in *Hawaii* v. *Mankichi*, 190 U. S. 197, indicates that the intent of Congress is not to be found in the literal meaning of the general words of Section 5. In that case the petitioner in habeas corpus had been charged with manslaughter upon an indictment not found by a grand jury and convicted by the verdict of nine out of twelve jurors (the other three dissenting from the verdict), pursuant to an Hawaiian statute. It was alleged that the petitioner had been denied his constitutional right to indictment by a grand jury and to unanimous verdict for conviction, upon the theory that the Constitution was extended to the Territory by the Newlands Joint Resolution of July 7, 1898 (30 Stat. 750) annexing Hawaii and providing that legislation of the Islands not "contrary to the Constitution of the United States" shall remain in force until Congress shall otherwise determine. The Court reversed the judgment of the United States District Court discharging the petitioner and held that

the literal meaning of the quoted words of the Resolution did not express the intent of Congress which was to permit the criminal procedure prescribed by the Hawaiian statute to continue until enactment of the provisions of the subsequent Organic Act, which in fact included provisions for grand juries and unanimous verdicts in criminal cases. Similarly, as to the present case, it was not the intention of Congress by the general language of Section 5 of the Organic Act to extend to the Islands a constitutional prohibition against any exercise of martial law authorized by the specific provisions of Section 67. If, as contended *supra,* pp. 24–36, Congress in Section 67 authorized the exercise of the martial law power here involved, it did not intend, by the general words of Section 5, to defeat its specific authorization.

This result also follows from the canon of construction that a specific provision in a statute prevails over a general provision in the same statute. *Missouri* v. *Ross,* 299 U. S. 72, 76; *Ponce* v. *Roman Catholic Church,* 210 U. S. 296, 307; *Kepner* v. *United States,* 195 U. S. 100, 125; King, *Legality of Martial Law in Hawaii,* 30 Cal. Law Review 599, 627–631 (1942); Crawford, *Statutory Construction,* 167 (1940); Sutherland, *Statutory Construction,* 5205 (3rd ed.). As is pointed out above (p. 26), Section 67 is specific in providing that the privilege of the writ of habeas

corpus may be suspended and the Territory placed under martial law not only in case of invasion, as is provided in the Constitution with reference to suspension of the writ of habeas corpus (Article I, Section 9, clause 2), but also in case of imminent danger of invasion. Although the Government contends (*infra*, p. 67) that Section 67 in this respect does not go beyond this constitutional provision but, on the contrary, is a valid practical construction of it, we think it is evident that Congress in any event did not in Section 5 intend to extend to the Territory any constitutional restriction on suspension of the writ or on the exercise of martial law which would nullify the specific language of Section 67.

2. *Congress had authority to limit the extension of the Constitution to Hawaii so as to preserve the exercise of the federal powers here in question*

The Constitution generally, and particularly the provisions of Article III, Section 2 and the Sixth and Seventh Amendments, guaranteeing the right to jury trial, did not extend to Hawaii *ex proprio vigore* immediately upon annexation of the Territory in 1898. *Hawaii* v. *Mankichi, supra; Peacock & Co.* v. *Rep. Hawaii,* 12 Haw. Rep. 27; *Rep. Hawaii* v. *Edwards,* 12 Haw. Rep. 55; *Honomu Sugar Co.* v. *Sayewiz,* 12 Haw. Rep. 96; see also *Balzac* v. *Porto Rico,* 258 U. S. 298; *Public Utility Commrs.* v. *Ynchausti & Co.,* 251

U. S. 401, 406; *Ocampo* v. *United States,* 234 U. S. 91, 98.

Although Mr. Justice White stated in a concurring opinion in *Hawaii* v. *Mankichi, supra,* that by the Organic Act "the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government" (190 U. S. at 220),[17] the meaning of this utterance is by no means clear. It did not relate to the decision concerning a conviction which antedated the Organic Act; and as to the specific procedural right to a unanimous jury verdict, involved in the case, Section 53 of the Act, 48 U. S. C. 635 makes explicit provision. Petitioner's argument, based upon the extension of the Fifth, Sixth, and Seventh Amendments to Hawaii (Br. 36), clearly overshoots the mark. Conceding that Section 5 of the Organic Act has the effect of extending the Constitution to Hawaii in many respects, we think it must be read in the light of other provisions which accord protections to the inhabitants of the Islands and that the qualification which Section 67 attaches to Section 5 was within the power of Congress to enact even if a similar enactment would not be constitutional in the continental United States. A review of the consti-

[17] The view that Hawaii is an "incorporated" territory is, of course, generally accepted. *Statehood for Hawaii* (Sen. Doc. No. 151, 75th Cong., 3d Sess., pp. 9, 94–95).

tutional provisions and cases bearing upon the subject will serve to show that Congress upon incorporating a territory may leave the exercise of certain powers within the territory less restricted by constitutional provisions than may be the case in the continental United States.

Article IV, Section 3 of the Constitution grants Congress the "power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; * * *". The nature of this power, bearing out its terms, indicates its plenary character and forbids limitations upon it by implication. In *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 323, the Court stated:

> In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.

In other words, in respect to its territories abroad the United States Government is vested with all the attributes of sovereignty, as it is in exercising the power over foreign affairs. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304; *United States* v. *Belmont,* 301 U. S. 324, 331.

The structure of the Constitution and the purposes for which limitations were placed upon the

powers of Congress, disclose concern for protection of personal civil and political rights within the several States, but do not indicate apprehension concerning the grant to the federal government of unrestricted powers in conducting the nation's external affairs and in dealing with other sovereign states. *Burnet* v. *Brooks,* 288 U. S. 378, 400; *Mackenzie* v. *Hare,* 239 U. S. 299, 311.

The proceedings of the Constitutional Convention reveal that the clause which became Section 3 of Article IV was introduced by Gorverneur Morris on August 30, 1787, and was approved without comment, but do not disclose the purpose of the delegates in adopting it. Farrand, *Records of the Federal Convention of 1787,* Vol. 2, p. 466. In 1803, however, following the debates on the purchase of the Louisiana Territory, Mr. Morris stated that his intention in introducing the clause was to give the government the power to govern territories as provinces.[18] It is not contended that constitutional limitations, apart from the specific references to territories contained in

[18] Mr. Morris, in a letter dated December 4, 1803, wrote to Henry W. Livingston (Farrand, *supra,* vol. 3, p. 404) as follows:

"I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."

them, [19] have no application outside the geographical limits of the several States; but they are not operative in the territorial possessions except as Congress has extended them there. Certain fundamental limitations, springing from the nature of the Government established by the Constitution, may be applicable there of their own force; but these do not include the restrictions upon martial law which are here pertinent. See *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313, *infra*, p. 50.

The decisions on the application of the Constitution to the territories, although expressing a variety of conflicting views, support the position taken here. Such constitutional rights as the right to a jury trial are not guaranteed by the Constitution *ex proprio vigore* in a territory immediately upon its acquisition, but only after and to the extent that Congress extends the pertinent constitutional provisions to the territory. *Rassmussen* v. *United States*, 197 U. S. 516; *Dorr* v. *United States*, 195 U. S. 138; *Hawaii* v. *Mankichi*, *supra*.

[19] Among provisions of the Constitution containing limitations upon governmental authority, only the Thirteenth Amendment prohibiting slavery in any place subject to the jurisdiction of the United States, the Eighteenth Amendment, and the provision of the Twenty-first Amendment governing the transportation or importation of intoxicating liquors into any State, territory, or possession of the United States, mention the territories specifically.

The *Rassmussen* case is the only case in which this Court has based a decision upon the view that legislation had "incorporated" a territory into the United States and thereby extended to it all of the protections contained in the Constitution. The case involved a conviction for the misdemeanor of keeping a bawdy house in Juneau, Alaska, in 1902 in violation of Section 127 of the Act of March 3, 1899, 30 Stat. 1253, 1272, enacting a criminal code for Alaska. The conviction resulted from a verdict of six jurors as provided for the Territory by Section 171 of the Act of June 6, 1900, 31 Stat. 321, 358. The conviction was reversed by this Court on the ground that Section 171 violated the Sixth Amendment, which was held to have been extended to Alaska by the Treaty of March 30, 1867 with Russia (15 Stat. 539), extending the rights of United States citizens to the inhabitants of the Territory and by subsequent legislation indicating the intent of Congress to incorporate the Territory into the United States.

The concurring opinions in the *Rassmussen* case expressly disclaim any reliance on the doctrine of incorporation expressed by Mr. Justice White for a majority of the Court. In lieu of this doctrine the concurring opinion of Mr. Justice Harlan (197 U. S. at 528) relies on the doctrine of extension of the Constitution *ex proprio vigore* to all territory of the United States. The

concurring opinion of Mr. Justice Brown (197 U. S. at 531) relies on the doctrine of irrevocable extension of constitutional provisions to a territory by legislation having such a purpose but holds that as to Alaska the right to jury trial should have been based upon the treaty, which conferred that right without extending the entire Constitution to the Territory. Earlier concurring opinions of Mr. Justice White expressing the incorporation doctrine (*Downes* v. *Bidwell*, 182 U. S. 244, 292; *Hawaii* v. *Mankichi*, 190 U. S. 197, 218–219) were accompanied by dissenting opinions in those cases criticizing the doctrine as indefinite in meaning (Fuller, C. J., 182 U. S. at 372, 190 U. S. at 225; Harlan, J., 182 U. S. at 391, 190 U. S. at 240).

The majority of the Court in the *Rassmussen* case did not suggest that Congress could not originally have qualified the incorporation of Alaska in order to withhold the constitutional right to jury trial from all or from some of the inhabitants. In fact, Article III of the Treaty, quoted in part and relied on in part by the Court (197 U. S. 522), excepted "uncivilized native tribes" from the protections extended to other inhabitants and provided that these tribes should be subject to such laws and regulations as the United States might adopt for them.[20] It was

[20] Article III provides (15 Stat. 539, 542):

"The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to

not involved in the decision or suggested by the Court in the *Rassmussen* case that this qualification upon the extension of constitutional rights to inhabitants of Alaska was invalid.

In *Balzac* v. *Porto Rico*, 258 U. S. 298, however, holding that the Organic Act of Porto Rico of 1917 did not incorporate Porto Rico into the United States and thereby require a jury trial under the Sixth Amendment in a prosecution for criminal libel, the Court,[21] in an opinion by Mr. Chief Justice Taft, expressed the incorporation doctrine without dissent (Mr. Justice Holmes concurring in the result without opinion), and stated that the constitutional provisions for a jury trial in criminal and civil cases apply to the "Territories of the United States" but not "to territory belonging to the United States which has not been incorporated into the Union". Other provisions were said to apply of their own

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Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

[21] Mr. Justice McKenna, who had concurred in the opinion of Mr. Justice White in *Downes* v. *Bidwell*, *supra*, was the only remaining member of the Court which decided the *Insular Cases*.

force.[22] See also *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674; *Ocampo* v. *United States*, 234 U. S. 91; *Dowdell* v. *United States*, 221 U. S. 325; *Trono* v. *United States*, 199 U. S. 521; *Kepner* v. *United States, supra;* Coudert, *Doctrine of Terri-*

[22] The Court stated (p. 304-305, 312-313):

"It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. *Webster* v. *Reid*, 11 How. 437, 460; *Reynolds* v. *United States*, 98 U. S. 145, 167; *Callan* v. *Wilson*, 127 U. S. 540, 556; *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 343, 347; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Black* v. *Jackson*, 177 U. S. 349; *Rassmussen* v. *United States*, 197 U. S. 516, 528; *Gurvich* v. *United States*, 198 U. S. 581. But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138, 145.

* * * * *

"The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted but emphasized by this court in all its authoritative expressions upon the issues arising in the *Insular Cases*, especially in the *Downes* v. *Bidwell* and the *Dorr Cases*. The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, * * *"

torial Incorporation, 26 Col. L. Rev. 821; Littlefield, *The Insular Cases,* 15 H. L. R. 169; Thayer, *Our New Possessions,* 12 H. L. R. 464; Langdell, *The Status of Our New Territories,* 12 H. L. R. 365.

None of the decisions expounding the doctrine of incorporation, including the *Rassmussen* case, suggests that Congress, in extending the constitutional provisions to a territory to the degree that the territory becomes incorporated into the United States, is without power to qualify the incorporation and the extension of constitutional rights by withholding particular constitutional rights which, in the first place, it is not obliged to extend to a territory. These decisions make clear the cogent reasons for the view that constitutional rights, such as the right to jury trial, are not extended to territories except as Congress extends them. *Balzac* v. *Porto Rico, supra; Ocampo* v. *United States, supra.* These reasons apply equally to support the view advanced by the Government in this case that Congress, in the Organic Act extending the Constitution to Hawaii, which is relied on to establish that Hawaii is an incorporated territory, had plenary power to qualify that extension to provide that neither the Sixth Amendment nor other constitutional provision should operate to make unlawful military trials under martial law authorized by Section 67 of the Organic Act. The *Rasmussen* case, involving a subsequent attempt by Congress to withdraw the

right to a jury trial under the Sixth Amendment which had been granted by prior treaty and legislation to the inhabitants of Alaska, presents an entirely different situation. In the present case, as in *Hawaii* v. *Mankichi, supra,* the specific provisions of Section 67 govern over the general provisions of Section 5 extending the Constitution generally to the Territory of Hawaii.

Moreover, nothing in the language or the arrangement of the text of the Constitution supports any doctrine of a neccesarily unqualified incorporation. The power to regulate the territories is found in Article IV which, by its context and separate location, suggests an independence from the limitations in Section 9 on the powers granted to Congress in Section 8 of Article I. This view is supported by the consideration that although some of the powers granted to Congress in Section 8 are general in their terms, other powers are subject to restrictions, such as the power to collect taxes, duties, imposts and excises which, under Paragraph 1 of the section, must be uniform "throughout the United States". This limitation refers to the States and not to the territories.[23] Similarly, the commerce clause of Section 8 empowers Congress to regulate commerce "with foreign nations, and among the several States, and with the Indian tribes", but no mention is made of territories. Section 9 of Article I also indi-

[23] *Downes* v. *Bidwell*, 182 U. S. 244; Langdell, *The Status of Our New Territories* (1899) 12 H. L. R. 365.

cates to some extent that it is concerned with limitations on the exercise of Congressional power within the States by clauses 1, 4, 5 and 6 referring to States but not to territories.

The Bill of Rights, contained in the first ten amendments, was adopted contemporaneously with the Constitution and, like Article I, was concerned principally with the division of power between the Federal Government and the States and with protection to individuals within the States. Although the Bill of Rights includes general provisions containing no explicit geographical limitations, some provisions support the view that as a whole it was not intended to apply outside the States. The Sixth Amendment provides that the prescribed jury is to be "of the State and district wherein the crime shall have been committed". The Tenth Amendment provides that powers not delegated to the United States nor prohibited to the States are reserved to the States or to the people, and thus suggests that all these amendments were addressed to congressional action within the States. The fact that other rights in the Bill of Rights, such as freedom of speech, assembly and religion, do not contain explicit limitations, does not overcome the clearly-implied limitation of these provisions to actions of the Federal Government in the States rather than in its territorial possessions.

The reasons for the constitutional limitations on Congress in legislating for the States were

not applicable to the different situation involving the territories. On the contrary, there were good reasons why such limitations should not bind Congress in dealing with the unforeseeable problems arising upon the acquisition of practically unknown territories on this continent or abroad by conquest, occupation or negotiation with foreign states. As to such territories and people, the Constitution wisely left the time and the extent of the application of the Constitution to the judgment of Congress based on the varying circumstances which would arise. This method has been vindicated by the century and a half of experience in which Congress has extended the Constitution to the territories as conditions permitted.

From the Ordinance of the Northwest Territory of 1787,[24] which preceded the Constitution, to the Act of June 22, 1936, c. 699, 49 Stat. 1807, 48 U. S. C. 1405, providing a civil government for the Virgin Islands, Congress has uniformly extended to the people of the territories a large measure of political and civil rights. The Ordinance was continued in effect without material change by the Act of August 7, 1789, c. 8, 1 Stat.

[24] The Northwest Ordinance established a representative civil government, insured civil liberties, and provided that "The said territory, and the States which may be formed therein shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation * * *". XXXII Journals of the Continental Congress 334, 341 (1787).

50.[25] Organic acts for other territories have granted them legislative power "not inconsistent with the Constitution and laws of the United States". Rev. Stat. § 1851.[26] Other statutes provided in addition that the "Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect * * * as elsewhere within the United States." Rev. Stat. § 1891.[27] The organic acts for Puerto Rico, the Philippine Islands, and the Virgin Islands provide for representative government and include a bill of rights more detailed than the first ten Amendments to the Constitution. 39 Stat. 951 (1917); 41 Stat. 1096 (1921); 39 Stat. 545 (1916); 49 Stat. 1807 (1936). The treaty with France for the cession of the Louisiana Ter-

[25] Similar provisions were incorporated in the acts establishing governments for the Territory South of the Ohio, 1 Stat. 106, 123 (1790); Mississippi, 1 Stat. 549 (1798); Indiana, 2 Stat. 58 (1800); Michigan, 2 Stat. 309 (1805); Illinois, 2 Stat. 514 (1809); Alabama, 3 Stat. 371 (1817); Wisconsin, 5 Stat. 10 (1836); Iowa, 5 Stat. 235 (1838).

[26] See also Acts for Orleans, 2 Stat. 283 (1804); Louisiana, 2 Stat. 331 (1805); Missouri, 2 Stat. 743 (1812); Arkansas, 3 Stat. 493 (1819); Florida, 3 Stat. 654 (1822); Oregon, 9 Stat. 323 (1848); Minnesota, 9 Stat. 403 (1849); Washington, 10 Stat. 172 (1853); and District of Columbia, 16 Stat. 419 (1871).

[27] See also Acts for New Mexico, 9 Stat. 446 (1850); Utah, 9 Stat. 453 (1850); Nebraska and Kansas, 10 Stat. 277 (1854); Colorado, 12 Stat. 172 (1861); Nevada, 12 Stat. 209 (1861); Dakota, 12 Stat. 239 (1861); Idaho, 12 Stat. 808 (1863); Montana, 13 Stat. 85 (1864); Wyoming, 15 Stat. 178 (1868); Oklahoma, 26 Stat. 81 (1890); Alaska, 37 Stat. 512 (1912); Hawaii, 31 Stat. 141 (1900), 36 Stat. 443 (1910).

ritory, 8 Stat. 200 (1803), provided that "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess".[28] Solicitude for the people of the territories has therefore marked the action of Congress with respect to them throughout our history.

Finally, apart from the propriety or validity of a qualification upon the incorporation of Hawaii into the United States which would exempt peace powers of Congress from constitutional limitations, it is submitted that the qualification of incorporation involved is entirely valid and proper when its scope is limited to preserving untrammeled the exercise of the war power of Congress and the Executive to provide for martial law in time of war in this outlying territory. It is submitted, therefore, that the Constitution does not apply to the Territory of Hawaii in any way which renders invalid the exercise of martial law authorized by Congress and involved in this case.

[28] A similar article was included in the treaty with Spain for the cession of Florida, 8 Stat. 252 (1819), and in the treaty with Russia for the cession of Alaska, 15 Stat. 539 (1867).

II

The Constitution, even if fully applicable to Hawaii, did not prohibit the petitioner's provost court trial

The petitioner contends that his military trial, without a jury, violated the Fifth and Sixth Amendments (Br. 15); the Government contends that even if the Constitution applies fully in Hawaii, contrary to our contention above, pp. 39–56, nevertheless (A) the Constitution empowers Congress to authorize trial of such offenses as the petitioner's when martial law has been declared if the military authorities reasonably deem such a trial necessary, and (B) the determination of the responsible authorities that trial of such offenses in military tribunals was necessary in Hawaii in 1944 is not unreasonable.

A. UNDER MARTIAL LAW DECLARED PURSUANT TO STATUTE THE TRIAL OF OFFENSES IN MILITARY TRIBUNALS IS CONSTITUTIONAL IF THAT COURSE IS REASONABLY DEEMED TO BE NECESSARY BY THE MILITARY AUTHORITIES.

The Constitution does not prohibit the trial of offenses in a military tribunal when martial law has been declared pursuant to statute if the military authorities reasonably deem that such trials are required. The correctness of this view is supported by the origin and nature of the Federal Government's power to impose martial law.

The Constitution does not use the term "mar-

tial law".[29] In time of war martial law is imposed in the exercise of the power to wage war which is expressly conferred by the Constitution on the Congress [30] and on the President.[31]

The power to impose martial law also springs from the inherent power of self-defense and self-preservation possessed by this nation which upon its creation by the Constitution became endowed with all attributes of sovereignty possessed by independent nations generally. *United States* v. *Belmont,* 301 U. S. 324; *United States* v. *Curtiss-Wright Corp.,* 209 U. S. 304. In exercising powers of this character, Congress and the Executive may exercise judgment and discretion of wide scope in determining threatened danger and

[29] The Constitutions of Massachusetts (Constitution of 1780, Part the First, Article XXVIII), New Hampshire (Constitution of 1784, Part the First, Articles 34, 51) and South Carolina (Constitution of 1895, Article I, Section 27) authorized martial law by similar provisions to the effect that no person, except those employed in the armed services, shall be subject to martial law, or to any pains or penalties thereunder, except by authority of the legislature. The Constitution of Maine (Constitutions of 1820 and 1876, Article I, Sections 6, 14), Maryland (Constitution of 1867, Article 32), Tennessee (Constitution of 1834, Article I, Section 25; cf. Constitution of 1870, Article I, Section 25), and Vermont (Constitution of 1793, Chapter I, Article 17) provide that persons other than members of the armed forces shall not be subject to or punishable under martial law. Rhode Island's Constitution of 1842 authorized the exercise of the law martial "in such cases only as occasion shall necessarily require" (Article I, Section 18).

[30] Article I, Section 8, clauses 1, 11.

[31] Article II, Section 2, clause 1.

selecting means to combat it. With respect to the war power, where the exercise of judgment by the branches of the government primarily responsible is required, the courts will not review the wisdom of their action or substitute judicial for legislative and executive judgment. *Hirabayashi* v. *United States,* 320 U. S. 81, 93. Judicial inquiry does not go beyond determining whether all the circumstances afforded a reasonable basis for the action taken, and this is a principle which has been applied to a great variety of measures. *Korematsu* v. *United States,* 323 U. S. 214; *Hirabayashi* v. *United States, supra; Ex parte Quirin,* 317 U. S. 1; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ex parte Milligan,* 4 Wall. 2; *Selective Draft Law Cases,* 245 U. S. 366; *Prize Cases,* 2 Black 635; *Mitchell* v. *Harmony,* 13 How. 115; *Luther* v. *Borden,* 7 How. 1; *Martin* v. *Mott,* 12 Wheat. 19.

Martial law is a particular form of exercise of the war power, or of related power to guard the public safety, involving certain types of actions by the military authorities such as detention of civilians, *Ex parte Zimmerman,* 132 F. (2d) 442 (C. C. A. 9), certiorari denied, 319 U. S. 744, and trial of civilians in military tribunals in domestic territory for acts contrary to public security or in violation of military orders, as in this case. *Ex parte Milligan, supra; Ex parte Vallandigham,* Fed.

Cas. 16816 (C. C. S. D. Ohio); *In re Kalanianaole, supra.*

This Court has noted that it may be assumed that there are "acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury". *Ex parte Quirin,* 317 U. S. 1, 29. Similarly, where the Constitution applies, a martial law trial of a civilian within the generally recognized scope of martial law conceivably might be prohibited by the Constitution. The American authorities are in agreement, nevertheless, that under the Constitution the validity of the exercise of martial law powers, as of other exercises of the war power, is determined with relation to military necessity. *Sterling* v. *Constantin,* 287 U. S. 378; *Moyer* v. *Peabody,* 212 U. S. 78; *Ex parte Milligan, supra; Luther* v. *Borden, supra; In re Kalanianaole, supra;* 8 Op. Atty. Gen. 365; Fairman, *The Law of Martial Rule,* p. 47 (1943); Wiener, *A Practical Manual of Martial Law,* p. 16 (1940).

Most of the decided cases involving the exercise of punitive powers under martial law in this country involve not war but riots or labor disturbances. The courts have divided on the question whether the facts accompanying such disturbances can warrant the exercise of punitive

martial law. Compare *Ex parte Jones,* 71 W. Va. 567; *State* v. *Brown,* 71 W. Va. 519; *United States* v. *Fischer,* 280 Fed. 208 (D. Neb.); *United States* v. *Wolters,* 268 Fed. 69 (S. D. Tex.), approving trial by military tribunals under such conditions with *In re Gillis,* 49 Mont. 454; *Franks* v. *Smith,* 142 Ky. 232, approving preventive measures under martial law but holding that punitive powers are unconstitutional under such conditions. See also *Ex parte Lavinder,* 88 W. Va. 713; *Constantin* v. *Smith,* 57 F. (2d) 227 (S. D. Tex.), affirmed sub. nom. *Sterling* v. *Constantin,* 287 U. S. 378. In *Sterling* v. *Constantin, supra,* this Court, although it did not conclude that the particular situation justified the exercise of martial law there involved, recognized that generally speaking, the validity of the substitution of executive for customary judicial proceedings during a state of martial law depends upon the necessities of the situation (287 U. S. at 400–402).

Congress has expressly recognized that situations may arise in which military necessity requires the substitution of military for civil tribunals in criminal cases. Section 3 of the Reconstruction Act of March 2, 1867, c. 153, 14 Stat. 428, provided that it shall be the duty of the military officer in a military district in previously rebellious territory to cause to be punished disturbers of the public peace and criminals and to allow local civil tribunals to try the offenders "or, when in his judgment it may be necessary for the

trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; * * *". Criminal cases were tried in military courts under this statute (13 Op. Atty. Gen. 59; 12 Op. Atty. Gen. 182). The validity of these trials was not ruled upon by this Court. *Ex parte Yerger,* 8 Wall. 85; *Ex parte McCardle,* 7 Wall. 506, 6 Wall. 318. It was held, however, that the military authorities had constitutional authority to substitute military for civilian tribunals in civil cases in occupied rebellious domestic territory. *Mechanics' etc. Bank* v. *Union Bank,* 22 Wall. 276; *The Grapeshot,* 9 Wall. 129.[32] It is a valid deduction that the necessities of war may supply a basis for a similar military judgment even in loyal domestic territory in the face of invasion; and the legislative provision in Section 67 of the Hawaiian Organic Act and other organic legislation for outlying territories, authorizing martial law in time of threatened invasion, may well contemplate such a situation.

The provisions for jury trial in Article III, Section 2, of the Constitution and in the Fifth and Sixth Amendments require juries only in cases customarily so tried under the common law and in cases similar to those. The purpose of the constitutional provisions was to preserve but not

[32] These decisions state that the power asserted in such domestic territory is the same as the power of military government asserted in foreign conquered territory. *Leitensdorfer* v. *Webb,* 20 How. 176; *Cross* v. *Harrison,* 16 How. 164.

to enlarge the common law right to jury trials. *District of Columbia* v. *Clawans,* 300 U. S. 617; *District of Columbia* v. *Colts,* 282 U. S. 63; *Schick* v. *United States,* 195 U. S. 65; *Callan* v. *Wilson,* 127 U. S. 540. Recently this doctrine has been discussed and held to produce the result that the jury trial provisions are not applicable to the trial of a violation of the laws of war by a military tribunal even in the absence of martial law. *Ex parte Quirin,* 317 U. S. 1, 29–46. Similarly, the jury trial provisions do not apply to the trial of an offense which necessity requires to be brought before a military tribunal in a situation in which martial law has been established in a combat zone pursuant to an Act of Congress. Jury procedures are unknown to military tribunals. *Ex parte Quirin, supra,* at p. 39.

The Government, in addition to reliance on the constitutional power to declare and wage war, might also rely upon the power to make rules for the government and regulation of the land and naval forces (Article I, Section 8) and assert that this case is one of the "cases arising in the land and naval forces" expressly excepted from the grand jury requirements of the Fifth Amendment. The minority opinion in *Ex parte Milligan* (4 Wall. at p. 138) pointed out that persons attempting to injure the national forces might be subjected by Congress to military trial and punishment in the exercise of the constitutional power to regulate the land and naval forces, although the

minority opinion was not placed on that ground. But even if we assume, without conceding, that the provost court trial here was not a case arising in the land or naval forces when the accused is not a member of or associated with those forces, nevertheless a jury trial is not required in such a case because such provost court trials were never deemed to be within the scope of the constitutional provisions for juries. *Ex parte Quirin, supra,* 317 U. S. at p. 41.

Ex parte Milligan does not negative the validity of these general principles. The Court did state that an invasion must in fact be in progress to supply the military necessity justifying a martial law tribunal to try civilians for offenses; but this statement was dictum, as the four dissenting Justices stated (4 Wall. 136). The Court, moreover, was considering the power of a military commander acting in the absence of a state of martial law authorized by the Congress (4 Wall. 124). The language of the *Milligan* case with reference to the necessity of an actual invasion to justify military criminal tribunals, entirely apart from any other circumstances, is a more rigid test than that otherwise uniformly stated by this Court with reference to the war power. *Hirabayashi* v. *United States, supra;* cf. Hughes, *War Powers Under the Constitution,* Sen. Doc. 105, 65th Cong., 1st Sess., p. 12, 42 American Bar Association Reports (1917) 232, 245–246, 2 Mass. L. Q. 575; Fairman, *The Law of Martial Rule,* 163–167. We submit

that it is unrealistic to regard any single factor as controlling in all of the multitudinous situations which may confront the Government and the armed forces in time of war, calling for the exercise of summary powers.

Petitioner contends (Br. 29) that the lack of any military necessity for petitioner's trial by a military tribunal is indicated by the fact that the civil courts were open. It is true that the fact of open civil courts is one relevant factor for the consideration of the military commander in determining whether military tribunals are necessary for particular offenses, and for the courts in determining under the Constitution whether there is any reasonable basis for the military commander's use of military tribunals. Indeed, this factor may have been most important and an entirely reasonable test of military necessity for military tribunals when the Petition of Right was granted in 1628 and when warfare was restricted practically to the fields in which the armies were engaged. As military necessity changes, however, the test must change. The continued operation of the civil courts hardly supplies an adequate test of the necessity for military tribunals under conditions of modern warfare in which all, or very large parts, of the territories of the contending nations may be in combat zones or imminently threatened with long-range attack even while the civil courts are operating.

The views expressed in the *Milligan* case neces-

sarily had reference to conditions in Indiana in 1864. And it is to be noted that Chief Justice Chase in his separate opinion for four members of the Court said (4 Wall. 2, 140–141):

> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy [against the draft and in favor of rebellion]. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

Since the Milligan decision it has been uniformly recognized that the fact that the courts are open is only one of many factors relevant to determining the military necessity for military tribunals under the varied war conditions which may arise. *Ex parte Marais, supra; In re Kalanianaole, supra; The King* v. *Allen, supra;* Dodd, *The Case of Marais,* 18 L. Q. Rev. 143, 146–147 (1902); Richards, *Martial Law,* 18 L. Q. Rev. 133, 141–142 (1902); Charles Evans Hughes, *War Powers Un-*

der the Constitution, Sen. Doc. 105, 65th Cong., 1st Sess., p. 12, 42 A. B. A. Rep. 232, 245–246, 2 Mass. L. Q. 575, 587–588; 3 Willoughby, *Constitutional Law,* p. 1602 (2d Ed., 1929); Fairman, *supra,* p. 163; Wiener, *supra,* p. 106.

Furthermore, the Court's statement in the *Milligan* case concerning the need for actual and present invasion to justify military tribunals in the continental United States was not addressed to and does not control or limit possible justification through military necessity in respect of invasion of an outlying territory such as Hawaii. The Congress recognized this distinction by the provision that martial law could be established and the privilege of habeas corpus suspended not only in cases of invasion, to which the words of Article I, Section 9, of the Constitution relate, but also in case of imminent danger of invasion. If, contrary to our contention, this provision was intended to operate within the framework of the Constitution as it applies in the continental United States, Congress was giving a practical construction to the fundamental charter which is entitled to great weight in determining the effect of the constitutional limitation upon the military power to establish military tribunals under a state of martial law. *Ex parte Quirin,* 317 U. S. 1, 41–42; *Downes* v. *Bidwell,* 182 U. S. 244, 249; cf. *Martin* v. *Mott,* 12 Wheat. 19, 29.

B. THE MILITARY COMMANDER'S JUDGMENT THAT MILITARY NECESSITY REQUIRED A MILITARY TRIAL OF THE OFFENSE HERE INVOLVED WAS NOT UNREASONABLE

The reasonableness of the military commander's judgment that military necessity required a martial law tribunal for this class of cases is supported by the historic facts relating to the Pacific war which may be judicially noticed and by the facts stated in the expert military opinions expressed in the record by Admiral Nimitz and General Richardson, the military commander. The facts of military significance occurring at the time of the attack on Pearl Harbor and thereafter not only show a clear basis for the establishment of martial law in the first instance, but afford support to the expert appraisal of the military situation in the Territory by Admiral Nimitz and General Richardson at the time of the provost court trial and the hearing in this habeas corpus proceeding in April, 1944. The devastation wrought by the Japanese attack in December, 1941, necessarily was a major factor influencing the military judgment with respect to the possible effects of another such attack in April, 1944 and the military necessity for the exercise of martial law in this case. This factor was accompanied by others arising in the community.

On December 7, 1941, the forces of Japan carried out at Pearl Harbor the most disastrous military attack that has ever been made against

the United States. Pearl Harbor had become in a few minutes our first war front (R. 1167). During and immediately after this unprecedentedly destructive attack, Japanese military planes obtained reconnaissance photographs of the extensive damage to our military installations. A continuation of this successful invasion, culminating in the landing of large numbers of enemy troops and occupation of the Islands, was anticipated by our military leaders. It is not possible to estimate the extent to which such a successful pursuit of the initial military advantage would have retarded our war effort, but obviously it would have had a crippling effect on Pacific operations. Enemy occupation of the Islands at the very least would have delayed ultimate victory for a long period of time and made it much more costly.

Admiral Nimitz and General Richardson, the military commanders chargeable with responsibility for defense of the Islands in April 1944, when this case arose, were also chargeable with direct knowledge of the destructive effect of a second attack on Pearl Harbor and of the difficulty of completely warding off such an attack. They were required to weigh very heavily in their appraisal of the military situation of 1944, the possible destructive effect and the far reaching consequences of another aerial or other invasion. They were required to appraise the military necessities of the situation in view of

what had actually happened. They knew that some months after the attack on Pearl Harbor, and even after the defeat of a Japanese task force in the Coral Sea and the defeat of another task force at Midway, the Japanese forces had actually succeeded in occupying American territory in the Aleutian Islands.

Admiral Nimitz testified that the Hawaiian area constituted the only base for the Government in the Pacific Ocean and that it had the greatest importance for military operations to the westward (R. 1073). He testified that in spite of daily searches by our forces a Japanese surprise carrier attack, similar to the attack on Pearl Harbor Day, was within the enemy's capabilities (R. 1073, 1078). He testified that invasion by stealth, by submarine commando raids and espionage parties was not only probable, but imminent and constantly impending (R. 1078). Admiral Nimitz's testimony was restricted to the general military situation which was his general responsibility and he did not testify concerning particular security measures adopted in the Islands because the responsibility for the security of the Islands had been delegated by him to General Richardson who had the responsibility to take all necessary measures (R. 1013).

General Richardson testified concerning the importance of the Hawaiian Islands to the safety of our West Coast (R. 1011–1012). He testified concerning the probability that the Japanese

enemy would attempt to repeat its successful attack on Pearl Harbor because of the great importance of this target in all our Pacific operations (R. 1016–1018, 1031–1042). He emphasized the enemy's capability of sending parties ashore from submarines to attack important installations or secure information of great military value about our prospective military operations (R. 1019–1021).

On the question of the military necessity for martial law tribunals to try civilians accused of assaults upon military or naval personnel discharging official duties, particularly military sentries guarding military installations, General Richardson testified that military trial of such offenses directly related to military security and was necessary in order to uphold the authority of military personnel in the discharge of their official duties (R. 1050–1051).[33] He pointed out that any failure of civil courts to convict violators of military security orders of this character would diminish his authority and ability to discharge his military responsibilities (R. 1057). He testified that for the prompt enforcement of such military security regulations, a military commander should not be required to rely upon other agencies of gov-

[33] The military importance of the duties of sentries or sentinels is manifest from the extreme penalty provided for their neglect of duty. Article 86 of the Articles of War (10 U. S. C. 1558), Winthrop, *Military Law & Precedents*, p. 616 (2d Ed. 1920).

ernment (R. 1052) and that speedy trial and punishment, which is a characteristic of martial law, was a very important factor in dealing with violations of military security regulations.

In all the circumstances the fact that the civil courts were open was not an adequate test of military necessity (*supra*, pp. 64–66). Failure of the civil courts to deal adequately with violations of military orders such as the order here involved, could not be risked (R. 1057). These considerations have special weight in relation to the offense here involved, assault by a civilian upon a sentry with intent to hinder him in the performance of his duty. No such offense was defined under the Hawaiian laws.[34] The City of Honolulu, in which the offenses occurred, had both a large military population and a population of civilian war workers far in excess of the normal peace-time population of the City. Large numbers of troops were in training in the Islands for the attacks on the Island approaches to Japan and on the home islands of Japan. In addition many thousands of civilian workers from the mainland were em-

[34] Revised Laws of Hawaii (1935) provide:

Sec. 5651. Battery defined. A battery, or an assault and battery, is the malicious and forcible infliction of a corporal injury on another, without authority or justification by law.

Sec. 5657. On public officer. Whoever shall commit an assault or an assault and battery on any public officer, civil or judicial, with intent to resist, prevent, hinder or obstruct him in the discharge or execution of his duty as such, shall be punished by a fine not exceeding one thousand dollars or by imprisonment not more than one year.

ployed at Pearl Harbor[35] and other naval and military installations. The limited housing and public recreational facilities in the City of Honolulu were inadequate for this military and civilian population. The military commander may well have considered that in such a situation overcrowding and other strains might produce rivalry and even some degree of physical conflict between the civilian and military populations.

Moreover, as General Richardson testified, the area here involved was a combat zone with a heterogeneous population in which in many cases alien affinities and loyalties were to be found (R. 1067). One-third of the civilian population were of the Japanese race and a very large part of the military personnel training in Hawaii to fight the Japanese, or awaiting transportation to combat against the Japanese enemy, were not accustomed to living in such a community as Hawaii. Even in times of peace the potential problems created in Hawaii by racially mixed juries in criminal cases have been recognized although, on the whole, it has been found that members of such mixed juries have not acted on a racial basis. *Law Enforcement in the Territory of Hawaii* (Attorney General Mitchell's Report to the Senate) Sen. Doc. No. 78, 22nd Cong., 1st Sess., pp. x, 22, 116–117, 120 (1932).[36]

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[35] The return to the writ of habeas corpus alleges that an average of over 78,000 persons, civil and military personnel, entered the Pearl Harbor Navy Yard daily (R. 51).

[36] Under the laws of the Republic of Hawaii in civil and

It is submitted that the military commander was entitled to consider all these factors, alongside the factor that the civil courts were open, in determining whether military necessity required the trial of the offense here involved before a military tribunal; and it cannot be said that in all the circumstances his determination was unreasonable.

General Richardson explained in his testimony that he had investigated very carefully the possibility of terminating the provost courts entirely in carrying out the directive of the President that governmental controls gradually be returned to the civil authorities (R. 1065, 1070). He concluded that some military orders considered essential to military security, such as the order here involved for protection of military personnel, which was not enforceable in the territorial courts, should continue to be enforced in the provost courts if his responsibility for military security were to be adequately exercised (R. 1065).[37]

That martial law was exercised only as military necessity was deemed to require, is shown by the fact that the more or less complete military controls imposed immediately upon the attack upon Pearl Harbor were gradually relaxed. Gen-

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criminal cases Hawaiians obtained Hawaiian juries and foreigners had foreign juries; in civil cases involving Hawaiians and foreigners mixed juries were used. H. Rep. No. 305, 56th Cong., 1st Sess., p. 20.

[37] The other General Orders which continued to be enforceable in the provost courts involved blackout regulations (General Orders No. 3, R. 118–140), air raid regulations (Gen-

eral Orders No. 29 of December 16, 1941 (*White* R. 82–85) authorized the civil courts of the Territory, which had closed on December 8, 1941, by order of the Chief Justice of the Supreme Court of the Territory under direction of the Commanding General (*White* R. 81), to reopen for trial of limited classes of cases not requiring juries or the subpoenaing of witnesses; General Orders Nos. 57, 133 and 135 (*White* R. 86–88, Appendix pp. 86–94) restored further functions, including jury trials, to the civil courts although some criminal offenses against the Government or related to the war effort were not, up to that time, restored to the civil courts (Appendix p. 89). Governor Stainback's proclamation effective March 10, 1943, reciting that martial law and suspension of the privilege of the writ remained in effect, provided for the restoration of various enumerated governmental functions to the civil authorities, including the conduct of judicial proceedings except certain proceedings against members of the armed forces and prosecution of violations of military orders (R. 70–74).

In the case of the military order here involved,

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eral Orders No. 4, R. 140–147), civilian security evacuation orders (General Orders No. 5, R. 147–152), alien enemy regulations (General Orders No. 6, R. 152–157), military area regulations (General Orders No. 7, R. 157–178) identification and registration (General Orders No. 8, R. 178–195), communications and photography (General Orders No. 9, R. 195–208), labor regulations (General Orders No. 10, R. 208–214), military property and firearms (General Orders No. 11, R. 214–220) and travel (General Orders No. 12, R. 220–225).

675125—45——6

in the all-important Pacific military base of Hawaii where invasion had actually occurred and constantly threatened, the military commander's control over the civilian population's interference with military and naval personnel in the performance of their official duties may well have been considered essential to complete military preparedness and required by public safety. It is difficult to imagine any conduct, short of wilful aid to the enemy, which could more directly affect the military security of the Islands, then operating under a state of martial law, than interference with military sentries at the vital Pearl Harbor installation with intent to hinder them in the performance of their duties. The safety of the installation, as well as the safety of the entire military and civilian population there, and the success of their war efforts, depended on the unhampered performance of duty by such sentries and other military and naval personnel. In view of these considerations the military commander could reasonably deem it necessary to adopt the measures here involved.

If there was a reasonable basis for the military commander to designate as an offense interference with military personnel in the performance of their duties, there was also such a basis for trying the offense in military courts, especially where, as here, the civil courts pursuant to the proclamations of February 8, 1943, had no jurisdiction of such offenses. The expeditious trial of

persons accused of interfering with military and naval personnel in the performance of their duties might reasonably have been considered necessary to the safety of the Territory, so that the full deterrent effect on the civilian population of the knowledge that defendants would speedily be brought to trial might be secured. (See testimony of General Richardson, R. 1028.) Military procedure, of course, is not subject to the delays which may occur in civil trials. See King, *Legality of Martial Law in Hawaii*, 30 Cal. L. Rev. (1942), 599, 611.

Even in peace time the Executive, in the exercise of the constitutional power to execute the laws, may take measures for the protection of civilian officers in the exercise of their functions even to the extent of killing an individual who attacks a civilian officer in the discharge of his duties. *In re Neagle*, 135 U. S. 1, 67. Surely in time of war the Executive, in the exercise of the authority granted both by the Constitution directly and by Congress, must be allowed a large measure of discretion in devising means for protecting the armed forces stationed in a vital military area in the discharge of their duties. To serve the paramount purpose of preserving the country against foreign enemies, the Executive must at the least be permitted the "range of honest judgment as to the measures to be taken in meeting force with force" which is accorded to a state governor for the more limited purpose of

preserving the peace of the State (*Sterling* v. *Constantin*, 287 U. S. 378, 399). Since the belief that the exercise of martial law here involved was required by military necessity cannot be deemed to have been outside the range of honest judgment, the constitutional test was satisfied.

A determination that the public safety requires the continuance of martial law, undoubtedly valid in its inception, should be overturned with particular hesitation. It is apparent that it would be entirely unrealistic and unworkable for the judiciary to engage in a moment-to-moment reexamination of the question of the requirements of the public safety. An effective and fair system of military control must be worked out with skill and in detail, and it cannot be abandoned or changed with every improvement in the military situation or be easily reinstituted after unfavorable developments.

For the reasons expressed, it is submitted that the military commander's judgment that military necessity required trial of the offense here involved in a provost court in a Territory in which the privilege of habeas corpus remained suspended and in which a state of martial law, declared by the Governor and approved by the President, remained in effect, was not unreasonable. Hence petitioner's trial was a valid exercise of the war power under the Constitution, as it was under the Organic Act of Hawaii.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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Of Counsel.

DECEMBER, 1945.

APPENDIX

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 8, Cl. 11–16:

The Congress shall have Power * * * To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Art I, Sec. 9, Cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Art III, Sec. 2, Cl. 3:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. IV, Sec. 3, Cl. 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

AMENDMENTS

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

HAWAIIAN ORGANIC ACT

The Act of April 30, 1900, c. 339, 31 Stat. 141, provides in part:

SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: * * *

* * * * *

SEC. 67. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion,

insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

PROCLAMATIONS AND ORDERS

PROCLAMATION 2627

Termination of Martial Law in the Territory of Hawaii

By the President of the United States of America

A PROCLAMATION

Whereas the armed forces of the Empire of Japan having attacked and invaded the Territory of Hawaii, and the public safety requiring it, the Governor of the Territory of Hawaii, acting under the authority vested in him by section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), did, by proclamation dated December 7, 1941, suspend the privilege of the writ of habeas corpus and did place the said Territory under martial law until communication could be had with the President and his decision thereon made known; and

Whereas communication was had with the President and his decision approving the said action of the Governor of the Territory of Hawaii was

made known to the Governor on December 9, 1941; and

Whereas the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the said Territory:

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of April 30, 1900, do proclaim that the privilege of the writ of habeas corpus is hereby restored and that martial law is hereby terminated in the Territory of Hawaii, and I do hereby direct the Governor of the Territory of Hawaii so to proclaim to the people of the Territory of Hawaii.

This Proclamation shall become effective October 24, 1944.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 18th day of October, in the year of our Lord nineteen hundred and forty-four, and of the Independence of the United States of America the one hundred and sixty-ninth.

By the President:

[SEAL] FRANKLIN D ROOSEVELT

CORDELL HULL,
Secretary of State.

By the Governor of Hawaii

A PROCLAMATION

Whereas the Governor of Hawaii by proclamation of December 7, 1941, in the exercise of his powers under section 67 of the act of April 30, 1900, 31 Stat. 153 (48 U. S. C. 532), suspended the privilege of the writ of habeas corpus and placed the Territory of Hawaii under martial law, which action was approved by the President of the United States of America on December 9, 1941; and

Whereas by proclamation dated October 18, 1944, the President of the United States of America makes known that the public safety no longer requires that the privilege of the writ of habeas corpus remain suspended or that martial law continue in the Territory of Hawaii, and proclaims that the privilege of the writ of habeas corpus is restored and that martial law is terminated in the Territory of Hawaii:

Now, therefore, I, Ingram M. Stainback, Governor of Hawaii, do hereby proclaim to the people of the Territory of Hawaii that the privilege of the writ of habeas corpus is restored and that martial law is terminated throughout the Territory of Hawaii.

Done at Iolani Palace, Honolulu, Territory of Hawaii, this 24th day of October, 1944.

INGRAM M. STAINBACK.

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR

IOLANI PALACE

HONOLULU, T. H., *31 August 1942.*

General Orders No. 133

SECTION I. DECLARATION AND FINDING.

SECTION II. OPERATION OF THE CIVIL COURTS.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.

SECTION I. DECLARATION AND FINDING.—Hawaii constitutes the main Pacific outpost of the United States, and accordingly must be regarded as a fortress to whose defense the entire population of the Islands is committed. Its manpower and its economic resources must be subject to a single ultimate control. Martial law has been declared and the emergency which called it forth still prevails. The privilege of the writ of habeas corpus has been suspended and remains suspended. For all this there is authority in Section 67 of the Organic Act. The measures of military control have from time to time been modified in the light of experience and as changes in conditions have dictated. By General Orders No. 29 of December 16, 1941, the civil courts were reopened, subject to certain restrictions. It is now consistent with the public safety and the national defense that they be permitted more fully to exercise the powers normally exercised by them. They cannot, however, be allowed to interfere with the measures required by military security. It is to be understood that the relaxa-

tion herein specified is intended to return to the courts criminal prosecutions and civil litigation to the extent that war conditions permit. However, this action is experimental in nature and the Military Governor reserves the right further to limit the jurisdiction of the courts or to close them entirely, if that course shall be necessary.

SECTION II. OPERATION OF THE CIVIL COURTS.—In accordance with the above declaration and finding, the civil courts are now authorized to exercise their normal jurisdiction, subject, nevertheless, to the following restrictions and limitations:

1. The privilege of the writ of habeas corpus has been and remains suspended.

2. No criminal proceedings shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor.

3. No civil suit, action or other proceeding shall be maintained against any member of the armed forces of the United States or any person employed or engaged in any occupation, business, or defense activity under the direction of the Army, the Navy, or the Military Governor for any act done within the scope of such employment.

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until

seven (7) days shall have elapsed after the return day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney, made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default judgment shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the court again may enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

5. No person referred to in paragraphs 2 and 3 of this section, with respect to whom a certificate or exemption is issued by the Military Governor or under his authority, shall be selected or listed by any jury commission as a trial juror or grand juror and no subpoena issued to require the at-

tendance of any such person in such courts shall be valid. Based upon the requirements for labor in the National Defense, the Military Governor will from time to time prescribe the maximum number of persons who may be summoned or held for jury service.

6. (a) No person, firm, or corporation shall institute, maintain, or prosecute any action, suit or other proceeding in any circuit or district court in the City and County of Honolulu, Territory of Hawaii, to recover the possession of any premises used for housing accommodations as defined in Section 1, Ordinance 941 of the City and County of Honolulu, Territory of Hawaii, without first having obtained an order of the Rent Control Commission of said City and County of Honolulu that said plaintiff or plaintiffs is or are entitled to the possession of said premises, and no such suit, action, or other proceeding shall be instituted, maintained, or prosecuted for the purpose aforesaid in any such said circuit or district court without such order having been first obtained by the said plaintiff or plaintiffs in such suit, action, or other said proceeding.

(b) This section shall be retroactive and shall be deemed to have been in full force and effect as of and after January 27, 1942, and shall be retroactive and applicable to any such action, suit, or proceedings, now pending in said circuit and district courts as well as to those hereafter instituted, maintained, or prosecuted in said circuit and district courts.

(c) Payments of rent shall continue to be made at the dates the rent becomes due on all housing accommodations in accordance with the agreement

or procedure previously effected by the parties thereto. Landlords shall refund any unused portions of rent paid in advance to any tenants who are duly evacuated from the Territory of Hawaii.

7. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued will continue to be triable by Military Commissions or Provost Courts.

8. The Military Governor may waive any restriction or limitation established by the foregoing paragraphs, with respect to any person, case, or matter, or class of persons, cases, or matters.

SECTION III. FUTURE MODIFICATION OF THIS ORDER.—This order shall be subject to modification, or revocation, by the Military Governor whenever in his judgment such action is necessary.

All prior orders inconsistent herewith are hereby revoked.

SECTION IV. EFFECTIVE DATE.—This General Order is effective 12:00 noon, 2 September 1942.

By order of the Military Governor:

(Signed) Thomas H. Green,
THOMAS H. GREEN,
Brigadier General, A. U. S.
Executive.

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR

IOLANI PALACE

HONOLULU, T. H., *4 September 1942.*

General Orders No. 135

Jurisdiction of courts.—1. *Criminal Jurisdiction: General.*—This General Order is issued to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accordance with General Orders No. 133, this office, 31 August, 1942.

2. *Jurisdiction of Federal Courts.*—The United States District Court for the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. 10 USCA Section 1393 (Protection of uniform of the Army, Navy, Marine Corps, etc); 18 USCA Sections 1 to 17 inclusive (Offenses against the existence of the Government); 18 USCA Section 76a and 76b (Prohibiting reproduction of official badges, identification cards, and other insignia); 18 USCA Sections 94 to 98 inclusive (Offenses against the operations of the Government, such as enticing desertion from the Army or Navy, etc.); 50 USCA Sections 31 to 36 inclusive (Espionage); 50 USCA Sections 45 to 45d inclusive (Photographing, etc., defensive installations); 50 USCA Sections 101 to 106 inclusive (Wilful destruction, etc., of war or national defense material); Violations of the Selective Train-

ing and Service Act of 1940; and Federal statutes relating to Prostitution;

b. All other Federal Statutes heretofore enacted, although not hereinabove enumerated, and all other Federal Statutes hereafter enacted of the class of criminal offenses herein set forth, or relating to offenses directed against the Government, or violations in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

3. *Jurisdiction of Territorial Courts.*—All courts of the Territory of Hawaii shall not exercise jurisdiction over the following crimes and offenses:

a. Chapter 153, R. L. H. 1935 (Anarchistic Publications and Criminal Syndicalism); Chapter 178, R. L. H. 1935 (Disloyalty and desecration of flag); Chapter 180, R. L. H. 1935 (Disorderly House and Drunkenness); Chapter 199, R. L. H. 1935 (Military organizations); Chapter 205; R. L. H. 1935 (Riots, unlawful assemblies); Chapter 208, R. L. H. 1935 (Secret Associations); Chapter 214, R. L. H. 1935 (Vagrants, Disorderly persons, Loitering); Section 5710, R. L. H. 1935 (Places of Prostitution, etc.); Violations of any law, rule or regulation of the Territory or ordinance of any county or city and county relating to public health; assault or assault and battery on police officers or other law enforcement officers in violation of Section 5657, R. L. H. 1935; Act 123, S. L. H. 1937 (Carrying Deadly Weapons); Act

82, S. L. H. 1941 (Sabotage); Violations of traffic ordinances of any county or city and county relating to drunken driving; Violations of territorial traffic laws or traffic ordinances of any county or city and county during blackout hours as established by the Military Governor or during periods of alert as announced by the Military Governor;

b. All other Territorial statutes, county or city and county ordinances, rules and regulations heretofore enacted, or promulgated although not hereinabove enumerated, and all other Territorial statutes hereafter enacted or promulgated of the class of criminal offenses herein set forth, or relating to offenses directed against the Federal or Territorial Governments, or relating to offenses in connection with the war effort;

c. Violations of the laws of war or of proclamations, regulations, or orders of the Military Governor now in force or hereafter issued;

d. Instigations, conspiracies and attempts to commit the criminal offenses hereinabove referred to.

4. *Jurisdiction Over Persons.*—The Federal and Territorial courts shall not assume criminal jurisdiction over the following persons except when authority to do so is first obtained from the Military Governor:

a. Members of the armed forces of the United States;

b. Persons employed or engaged in any occupation, business, or defense activity under the direction of the Army, Navy or Military Governor where the offense is committed within the scope

of their employment. The determination of the status of such persons, and whether an offense is committed within the scope of employment shall rest with the Military Governor whose decision shall be final.

5. *Jurisdiction of Military Commissions and Provost Courts Retained.*—Military Commissions and Provost Courts shall retain and exercise all jurisdiction and powers heretofore granted them by the Military Governor except as otherwise provided herein.

6. *Determination of Jurisdiction Where Questioned.*—Whenever the jurisdiction of the Federal or Territorial Courts, or Military Commissions, or Provost Courts, to hear and determine any case shall in any manner or for any reason be questioned, then in every such case, the issue of jurisdiction shall be determined by the Military Governor whose decision shall be final; and, notwithstanding any other provision of this or any other order of the Military Governor, the Federal or Territorial Court, or Military Commission or Provost Court, as the case may be, shall take, have and exercise jurisdiction in accordance with such determination and decision.

7. *Special Cases.*—Notwithstanding any provision of this or any other order of the Military Governor to the contrary, the Military Governor may, whenever in his opinion such action be necessary in the public interest, exercise jurisdiction at any time over any crime or offense or person, and direct that the same be tried before a Military Commission or Provost Court.

8. *Future Modification of This Order.*—This order shall be subject to modification or revoca-

tion, by the Military Governor whenever in his judgment such action is necessary.

9. *Effective Date.*—This order shall take effect forthwith. Criminal cases pending before the Provost Courts and Military Commission of the class which is within the jurisdiction herein given to the Federal and Territorial courts and in which no plea has been entered shall be tried and determined by the Federal or Territorial court, as the case may be.

By order of the Military Governor:

(Signed) Thomas H. Green,
THOMAS H. GREEN,
Brigadier General, A. U. S.,
Executive.

U. S. GOVERNMENT PRINTING OFFICE: 1943